1947

Some Recent Labor Cases: 1941-1947

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During the period covered by this survey one case in every five reaching the Supreme Court of the United States has involved problems of labor, while the proportion of labor cases in many of the state courts and the lower federal courts has been almost equally great. It is, therefore, possible to deal with only a selected group of cases in any such brief survey as here undertaken.¹

With the exception of the cases involving freedom of speech and press and arising under the application of the principles of the First and Fourteenth Amendments to state action, most of the cases of importance have arisen under the provisions of some federal labor legislation and will be so classified.

I. Freedom of Speech and Press

A. Freedom of Speech and Press for the Employee

Any consideration of the problem of freedom of speech and press as it affects the employee or his representatives in labor controversies necessarily presupposes familiarity with the basic doctrine set forth by cases like Thornhill v. Alabama² and Carlson v. California³ to the effect that picketing by em-
ployees or a labor organization as a means of giving publicity to the facts involved in a labor dispute within the area of free discussion guaranteed by the First Amendment to the Constitution against national action, and as read into the liberty provision of the due process clause of the Fourteenth Amendment for protection against state action. "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," said the Court in the Thornhill case, and picketing with placards proclaiming the facts or issues was held to be protected as a part of that process.

Two other background cases, both of which were decided during the 1940 term of the Supreme Court, should be mentioned. In denying validity to a very broad injunction granted by a state court and enjoining a wide area of union activity ranging from peaceful persuasion to acts of violence, the Supreme Court in American Federation of Labor v. Swing denied that the non-existence of a dispute between an employer and his employees made peaceful picketing a proper subject for restraint. "Such a ban on free communication," said the court, "is inconsistent with the guarantee of freedom of speech. . . . A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." That the protections thrown around labor activity by these cases was subject to some very considerable limitations was first made clear by the case of Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., decided the same day as the Swing case. The Court here not only gave recognition to the leeway for injunction to restrain violence, intimidation, and coercion involved in picketing, but sustained the validity of a state restraining order preventing future peaceful picketing on the basis of what the majority found to be such a background of past violence as would carry over into future peaceful picketing and give it a flavor of intimidation. A vigorous, well reasoned and exhaustive dissenting opinion by Mr. Justice

4. 310 U. S. 88, 103.
6. 312 U. S. 321, 325, 326.
Black, along with the majority opinion by Mr. Justice Frankfurter, furnishes a wealth of material for careful study of this problem.

If the majority opinion in the *Meadowmoor* case provides the first express limitation upon the doctrine here under consideration, the case of *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe* carried the limitation further. The majority opinion of Mr. Justice Frankfurter is somewhat difficult to reconcile with the doctrine of the *Swing* case, and has been generally regarded as restricting materially the applicable scope of the doctrine of the *Thornhill* and *Carlson* cases. By a 5 to 4 decision the Supreme Court sustained an injunction, under the Texas anti-trust statute, restraining peaceful picketing of a cafe owned by Ritter due to the employment of non-union carpenters and painters in the erection of a new building which Ritter was having built in the same city but at some distance from the cafe. Admitting that such peaceful picketing, if it had been carried on at the scene of the new building, in connection with the erection of which the dispute arose, would have been fully protected by the doctrine of the *Thornhill* case, Mr. Justice Frankfurter asserted that such protection may properly be restricted to the scene of the dispute and the industry out of which it arose. Since there was no dispute between Ritter and his cafe employees concerning the operation of the cafe, peaceful picketing in that vicinity may properly be restrained. A contrary view, it is asserted, "would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."

Both Justice Black and Justice Reed wrote vigorous dissenting opinions, with Justices Douglas and Murphy joining with the former. The dissents pointed out that the purpose of the injunction was to protect from injury the cafe business of Ritter who was a party to the dispute, and to uphold it was greatly to circumscribe the doctrine of the Thornhill case. While the *Swing* case purported to make it clear that the protection of peaceful picketing is not to be restricted to the case of an employer and his own employees, the *Ritter's Cafe* case excluded from that protection those not employed in the same industry, and applied this new doctrine to a case of an employer against whom the picketing was otherwise properly directed, because such picketing was directed to his other business establishment.

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which, incidentally, happened to be the only place where the picketing could be calculated to be effective.

In *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, decided the same day as the *Ritter's Cafe* case, was involved a case where independent peddlers bought baked products from bakeries and sold to retailers in competition with the distribution of bakery products through the union employees. Said peddlers worked seven days a week and refused to join the union which was attempting by collective bargaining to secure better wages, hours, and conditions of labor for the drivers. The Supreme Court unanimously set aside an injunction granted by a state court restraining the drivers from peaceful picketing of the bakeries and retailers with whom the peddlers did business. The Court admitted that "a state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual," but found it was practically impossible for the drivers to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed. To the position taken by the state court that since there did not exist a labor dispute as defined by the New York statute the legality of the injunction followed automatically, the Supreme Court replied that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

In *Cafeteria Employees Union v. Angelos* petitioners had been enjoined by a New York court from picketing respondents' cafeteria. The alleged purpose of the picketing was to organize the cafeteria, though it was operated by its owner without the aid of employees. Signs carried by the pickets were calculated to give the impression that the pickets had been employees in the cafeteria and that the owner was unfair to organized labor. Also reference was made to patronizing the place being the equivalent of "aiding the cause of Fascism." The Supreme Court, in setting aside the injunction said "to use loose language ... like 'unfair' or 'fascist' ... is not to falsify facts," and reiterated the doctrine of the famous *Swing* case to the effect that "a state cannot exclude workingmen in a particular industry

11. 315 U. S. 769, 775.
12. *Id.* at 774.
13. 320 U. S. 293, 64 Sup. Ct. 126 (1943).
13a. See Sec. 8(b) (4) of 1947 Act.
from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' Thus the fact that the pickets were not and never had been employees of the owner of the enterprise being picketed was a matter of no consequence.

Commenting on the famous Meadowmoor Dairies case which sustained an injunction against picketing because it was thought to be permeated throughout with violence and coercion, although all alleged acts of violence had occurred sometime earlier, and noting that the right of free speech in the form of future picketing cannot be forfeited because of dissociated and sporadic acts of past violence, the Court said, "still less can the right to picket . . . be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."14

Recognition of the right to enjoin violence in connection with picketing was made clear by the Supreme Court in the case of Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board16 in which an order of the State Employment Relations Board restraining picketing was upheld on the ground that all that was done by the order and the State Employment Peace Act on which the order was based, as interpreted by the Supreme Court, was to forbid and restrain violence while peaceful picketing was unmolested. Thus there was no interference with constitutional rights of free speech and press safeguarded by the doctrine of the Thornhill case.

In a somewhat similar case decided the same day and involving an order of the same Wisconsin Employment Relations Board, under authorization of the same Wisconsin Employment Peace Act, forbidding a union and its members, in connection with a labor dispute, to engage in mass picketing, picketing employees' homes, threatening employees, and obstructing entrance to employer's factory, the Court held that the state order was not void as in conflict with the National Labor Relations Act and asserted that the federal act did not so far occupy the field as to preclude the states from passing police measures supplementing the federal regulation. This case, Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board,16 did not deal

14. 320 U. S. 293, 296.
directly with freedom of speech, but was decided solely on the basis of the
commerce power and conflict with a federal statute, but is mentioned here
for the purposes of comparison, since the opinion of the Court, though silent
on the matter of applying the First Amendment, would seem to make it
quite clear that such activities as there restrained do not enjoy any consti-
tutional protection.

One of the most important of the cases involving labor and the First
Amendment, though not concerned with picketing or the immediate rela-
tions of employer and employee, is that of Thomas v. Collins, involving a
statute of Texas regulating labor unions and, among other things, requiring
every “labor union organizer” to present his name, union affiliation and
credentials to the Secretary of State and secure an “organizer’s card” before
soliciting members for his organization. “Labor union organizer” was de-

were the "sole objects of the meeting," and that it was not possible to draw a line between the making of such a speech and solicitation of members, since the statute would forbid "any language which conveys, or reasonably could be found to convey, the meaning of invitation." Then, said the Court, "the restriction's effect ... in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card."

Finally, the Court asserted that "when legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty (since it might be construed as solicitation), freedom of speech for them will be at an end. ... We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Four Justices in dissent thought the application of the statute should be narrowly restricted to working merely as a solicitor for a remuneration, and since the requirement was only one of registration for identification purposes and no discretion to withhold the card rested with the Secretary of State, no invasion of rights under the First Amendment was involved.

For purposes of comparison with the Thomas case might be mentioned that of Hill v. Florida which held invalid, solely as being in conflict with the National Labor Relations Act guaranteeing freedom in the selection of representatives for collective bargaining, a Florida statute requiring business agents of labor unions to pay $1.00 for an annual license, to be withheld from one who has not been a citizen for ten years, or has been convicted of a felony or is not of good moral character, to be granted or denied by a board, apparently in the exercise of its sound judgment, after a thirty day period in which objections may be filed to the issuance of such a license. Also the statute required the union to pay a like fee and file certain reports.

B. Freedom of Speech and Press for the Employer

Much has been and is being said and written about employer free speech and the need for legislation to give to the employer a freedom of expression comparable to that enjoyed by the employee or his representa-
The problem arises because of the provisions of Sections 7 and 8 of the National Labor Relations Act protecting the employee from unfair labor practices by the employer and the fact that coercion by the employer in regard to employees organizing and choosing collective bargaining representatives is often exerted by statements as well as by acts. With the employer having the power to discharge or otherwise use his economic force to the disadvantage of employees, his statements that would otherwise be protected may well have a coercive effect against which the Act of Congress is calculated to provide protection.

While the problem thus involved primarily grows out of the application of the National Labor Relations Act, the cases applicable to it are discussed here because of the relation of this problem to that of employee freedom of speech discussed above.

The leading case on this problem, yet one that is very difficult properly to interpret and apply, is that of National Labor Relations Board v. Virginia Electric & Power Co.21 decided in the 1941 term of the Supreme Court. The element of communication giving rise to the free speech controversy in this case was set in a background of other activity calculated to give rise to a finding of anti-union or unfair labor practices. The principal facts found by the National Labor Relations Board and dealt with by the Court were that the company was and had been hostile to labor organizations, had posted a bulletin appealing to its employees to bargain with it without the intervention of an outside union, and had directed its employees to select representatives to attend meetings at which company officials would speak on the Wagner Act. At such meetings two high company officials read identical speeches which urged the employees to set up their own bargaining organization. Application cards for membership in the proposed Independent union were distributed throughout the company's plants and many were signed on company property and on company time. Within the space of a very few weeks, the organization of the Independent was completed, a contract was executed providing for a closed shop, check-off, and a wage increase. The company paid to the Independent $3000.00 before it had time to collect it by way of the check-off, and discharged employees refusing to join the Independent.

The board found that the company had engaged in unfair labor practices, that the Independent was company-dominated, and that the posted

bulletin and the speeches had the effect of interfering with, restraining and coercing the employees in the exercise of their right of self organization under Section 7 of the National Labor Relations Act. This latter finding was charged by the company to be violative of its right to free speech under the First Amendment.

In dealing with this aspect of the case, Mr. Justice Murphy, speaking for the Court, said,

"Neither the Act nor the Board’s order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For ‘Slight suggestions to the employer’s choice between unions may have telling effect among men who know the consequence of incurring that employer’s strong displeasure.’ International Association of Machinists v. National Labor Relations Board, 311 U.S. 72, 78, 61 Sup. Ct. 83, 87, 88, 85 L.Ed. 50.

“If the Board’s order here may fairly be said to be based on the totality of the Company’s activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board’s ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards’ warning to the employees that they would be discharged for ‘messing with the C.I.O.,’ the discharge of Mann, the quick formation of the Independent and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has
Without indicating clearly that these utterances, if taken alone, were to be protected by the First Amendment, though perhaps intimating as much, and because it was not clear that the board's order has been based on the totality of the company's conduct of which these utterances were a part, rather than upon the utterances themselves, the Court sent the case back for redetermination by the board. A second order by the board was held by the circuit court of appeals to have been based on the "totality of the company's activities," and when the case returned to the Supreme Court in 1943 the freedom of speech issue was not presented, and the Court has not squarely dealt with that issue since, further than to deny certiorari in some cases where the issue had been raised below.

Thus the matter is far from being clarified, but the doctrine of the Virginia Electric case has done much to help guide the development in this field. Clear it is that coercive acts amounting to unfair labor practices within the prohibition of the National Labor Relations Act may include in their "totality" statements calculated to have a coercive effect. Whether such statements standing alone would be protected by the First Amendment is not wholly clear. Judge Learned Hand in National Labor Relations Board v. American Tube Bending Company has suggested that perhaps the Virginia Electric case should be interpreted to mean that such protection should exist, though in the case he was deciding there were no other coercive circumstances and the utterances standing alone were not considered sufficiently coercive to sustain a board order, even if the constitutional protection were regarded as not being applicable.

Prior to the time of the Virginia Electric case, the board had held that the making of threats to discharge workers if they joined a union, or to withhold raises or promotions, or to close the plant if a union were voted in, were, by virtue of the economic power of the employer to carry out such threats, unfair labor practices within the condemnation of the Act. There is probably little disposition to quarrel with such a conclusion today.

Very recently an industry attorney writing on the subject of employer freedom of speech suggested, "if coercion is implicit in the words used or if the obvious meaning of the words is a threat to exercise superior eco-

23. 134 F. (2d) 993 (C.C.A. 2d, 1943) Cert. denied 320 U. S. 768, 1943.)
nomic power with intent thereby to override the rights of employees, words of an employer, whether oral or written, are coercive *per se* and therefore unfair labor practice,\(^{24}\) which clearly the prohibitions of the act should apply to. There is seldom, of course, a coercive statement that is not set in a totality of conduct, coercive or otherwise, all of which should be carefully considered in determining whether it properly can be brought within the statutory prohibition.

The Fifth Circuit Court of Appeals in the case of *Jacksonville Paper Co. v. National Labor Relations Board* in enforcing a board order because of other acts had this to say:

"The Act does not take away the employer’s right to freedom of speech. . . . We take it that an employer has the right to express his hostility to the Union if he has any. He has a right to express his opinion of the leaders of the Union, be that opinion good or bad. He is not precluded by the Act from inquiring or being informed as to the progress of the efforts at unionization. He has a right to inquire if the Union was organized or if it has ‘washed up,’ but the employer cannot under the Act use that constitutional right of freedom of speech threateningly or coercively, and especially when he has within himself the power to enforce his threats.\(^{25}\)

In the case of *National Labor Relations Board v. J. L. Brandeis & Sons* the Eighth Circuit Court of Appeals, purporting to adhere to the *Virginia Electric* case, asserted that “If respondent used coercive language it may be held responsible in these proceedings notwithstanding the constitutional guarantee of free speech. . . . The sole statutory test is interference, restraint or coercion. . . . It is here urged by the Board that the repetition and vehemence of statement by the officers of respondent rendered such statements coercive but we think the right of free speech and the exercise of that right cannot rest on so fragile support. So long as the reasoning power of the employee and not his fear is appealed to, the Constitution protects.\(^{26}\)

More recently the Eighth Circuit Court of Appeals again, speaking through Judge Gardner in *National Labor Relations Board v. Kopman-Woracek Shoe Mfg. Co.*, a case arising in Flat River, Missouri, emphasized the freedom of expression for the employer, short of threats and coercion.

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\(^{25}\) 137 F. (2d) 148, 152 (C.C.A. 5th, 1943) (Cert. denied 320 U. S. 772, 1943).

\(^{26}\) 145 F. (2d) 556, 566 (C.C.A. 8th, 1944).
"The employer has the undoubted right," runs the opinion, "to express his opinion on the merits of labor organization controversies and the right to indicate his preference for individual dealings with employees. . . . While the employer may attempt to persuade his employees with respect to joining or not joining a union, he may not, however, indulge this right to the extent of coercion or threats of reprisal." A circular letter sent by the employer to all employees in their pay envelopes and apparently arguing against the need for a union (contents not set out by court) was assumed by the court to be, standing by itself, within the guaranty of the First Amendment. However, admonitions by the foreman and supervisors that conditions would be worse if the union came in, "if the union gets in maybe you will not have to work at all. . . . we will all be walking the streets," were said by the court to amount to threats that the plant would close down and the employees would be out of work if the union was brought in, and viewed in the light of all the facts and circumstances—the totality of the company conduct—"were not mere expressions of personal opinion, but were threats and appeals to the employees' fear that they would lose their jobs if they should organize the union," and constituted an unfair labor practice.

Without further clarification by the Supreme Court, it is not easy to speak with assurance as to the exact extent or limits of employer free speech, but on the basis of a survey of board and lower court action since the decision of the Virginia Electric case, it seems proper to agree with the representative of management writing in the Tulane Law Review, when he says:

"It would now seem quite clear that, under the law in 1946, if an employer avoid acts of coercion, domination discrimination and restraint apart from his oral or written speech; if he avoids threats, actual or implied, of those types of future action on his part; if he sees that his supervisors and any others who might be acting for him do likewise; if he states the right of self-organization clearly and unequivocally, and promises that there will be no reprisals if it is exercised; and if he confines himself to the truth, without passion or prejudice, or to clear statements of his opinion; he can say almost

28. Id. at 105. For a somewhat similar case in which statements by the employer were held to be protected since "there is no evidence which could reasonably be said to give to Barr's remarks the import of a covert threat," see National Labor Relations Board v. Montgomery Ward & Co., 157 F. (2d) 486, 500 (C.C.A. 8th, 1946).
anything he chooses about the unions or union leaders and can advise his employees, either generally or in specific detail.\textsuperscript{29}

While his matter is being dealt with by provisions in proposed legislation now pending before Congress, it is entirely possible that unimpeded judicial interpretation and application might more effectively develop a satisfactory status for employer freedom of expression, consistent with the purposes of the National Relations Act to protect employees from coercion, than is likely to emerge from action by Congress.\textsuperscript{29a}

II. THE NATIONAL LABOR RELATIONS ACT

A great many cases involving charges of unfair labor practices in violation of the National Labor Relations Act, other than those dealt with above under the heading of free speech, have been before the courts during the period here under consideration, but only the more important of those before the Supreme Court will be mentioned.

A. Prohibition of Union Solicitation on Premises of the Employer

The not unusual practice of forbidding union solicitation upon the premises of the employer came before the Court in Republic Aviation Corporation v. National Labor Relations Board,\textsuperscript{30} and the Court upheld the validity of the board's determination that such a general prohibition by a company against soliciting on the premises "in so far as it prohibits union activity and solicitation on company property during the employees' own time" is an invalid rule as an unreasonable interference with the right of self-organization, and that the discharge of employees for violation of the rule constituted an unfair labor practice, although it was admitted that the rule was a general one applicable to all types of solicitation and that there had been no bias or discrimination by the company in enforcing the rule. A similar board ruling was more recently upheld by the Eighth Circuit Court of Appeals in May Dept. Stores Co. v. National Labor Relations Board.\textsuperscript{31}

B. Refusal to Bargain: Contracts with Individual Employees

One of the significant cases in the 1943 Supreme Court term is that of J. I. Case Co. v. National Labor Relations Board\textsuperscript{32} where an employer was charged with having refused to bargain with a certified union, his alleged

\textsuperscript{29} Morgan, \textit{op. cit. supra} note 24 at 520.
\textsuperscript{29a} See Section 8(c) of the 1947 Act.
\textsuperscript{30} 324 U. S. 793, 65 Sup. Ct. 982 (1945).
\textsuperscript{31} 154 F. (2d) 553 (C.C.A. 8th, 1946) (Cert. denied 67 Sup. Ct. 72, 1946).
\textsuperscript{32} 321 U. S. 332, 64 Sup. Ct. 576 (1944).
justification being that at a time when the union did not represent a majority of the workers he had entered into individual one-year contracts with approximately 75% of the employees and those contracts had not yet expired.

In speaking for the Court and upholding the board’s order to bargain with the certified union as to wages and hours, Mr. Justice Jackson emphasized that a collective labor agreement does not preclude the use of individual contracts of employment, but that the collective agreement serves to fix the terms of employment which control the individualhirings and that such individual contracts, which are subsidiary, may not run contrary to the provisions of the collective agreement any more than an individual shipper can contract away benefits secured by the filed tariffs of a railroad, or a utility customer the benefits of legally established rates. Thus each employee, though he might have yielded to less favorable terms in an individually bargained contract, is not permitted to waive any of the benefits of the trade agreement; and to allow the employer to enforce the less favorable terms of the individual contracts would be contrary to the purpose of the National Labor Relations Act which is "to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." To the suggestion that this may well work to the injury of the more highly skilled employees who might be in a position to make especially advantageous individual contracts for themselves, Mr. Justice Jackson pointed out that "the practice and philosophy of collective bargaining looks with suspicion on such individual advantages." Except as to areas left open for individual bargaining by the terms of the collective agreement, "advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long range expense of the group as a whole. . . . The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules and if it collecticizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."
This, it is to be noted, is to be true whether the individual who might secure a better contract for himself may have voted for or against representation. This conclusion appears to be amply supported by the language of the statute in Section 9(a) providing that representatives selected by the majority shall be the exclusive representatives of all the employees in such unit for collective bargaining, with the proviso that "any individual employee or group of employees shall have he right at any time to present grievances to their employer."

The result of this case would seem to make it clear that aside from presenting grievances, the individual employee who may have opposed the selection of the union designated by the majority as its bargaining representative, is permitted to deal with his employer only through the agency of that bargaining representative selected by the majority. This would seem to be a repudiation of the dictum contained in the opinion in the Jones & Laughlin case, which originally upheld the constitutional validity of the National Labor Relations Act, to the effect that the right of the employer to make individual contracts with individual employees was not destroyed.

Whether this case is also in effect a repudiation of the Carter Coal Company case of 1936, invalidating the Guffey Coal Act which made wage agreements with a majority of the coal producers binding upon the whole industry, it is hardly necessary to inquire.

Another case decided by the Supreme Court in the same year, Medo Photo Supply Corp v. National Labor Relations Board, gave further meaning to these same provisions of the statute. Where the majority of the employees in a single department of the Medo Corporation had designated a union as their bargaining agent and while bargaining negotiations were apparently in progress the corporation induced the employees to abandon the union by granting a wage increase, which action was held to be unlawful on two grounds. In the first place, negotiating with the individual employees to ascertain their willingness to withdraw from the union in return for a wage increase amounted to an interference with the exclusive bargaining rights of the union as emphasized by the J. I. Case Co. decision; and in the second place, what is closely allied to the first, the promise of increased wages to induce the employees to withdraw from the union constituted an unlawful interference with the right of collective bargaining.

Somewhat the same problem was more recently involved in the Famous Barr case in St. Louis, *May Department Stores Co. v. National Labor Relations Board*, where an employer sought authority of the War Labor Board for a general wage increase applicable to some 5000 employees, including a small group for whom a bargaining representative had been certified by the National Labor Relations Board, without taking the matter up with that certified bargaining agent, which action was publicly announced to its employees. This was held to be an unfair labor practice under Section 8(1) of the Wagner Act. The company had refused to recognize the certified union and sought to preserve its opportunity to test the validity of the certification in the courts.

In holding the company’s action to be an unfair labor practice the Supreme Court said: “Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot ... be distinguished from bargaining with individuals or minorities” as involved in the *Case* and *Medo* cases. “Such unilateral action minimizes the influence of organized labor. It interferes with the right of self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” The Court further pointed out that there was no basis for eliminating from consideration the announcements or publication of the employer’s action to the employees on any ground that they were an exercise of the right of free expression or free speech secured by the First Amendment, but were properly regarded as a part of the “totality” of company activities within the doctrine of the *Virginia Electric* case.

### C. Employee Status and the Proper Bargaining Unit

The case of *Packard Motor Car Co. v. National Labor Relations Board* brought before the Supreme Court the somewhat vexed question of the legality under the statute of foremen’s unions on which the board had vacillated a bit in the past. The Sixth Circuit Court of Appeals had sustained a ruling of the board to the effect that foremen are employees within the meaning of those provisions of Sections 2, 7, 8 and 9 of the Act defining employees and guaranteeing the rights of self-organization and the choice
of representatives for collective bargaining, and are therefore an appropriate unit for collective bargaining purposes. This decision was affirmed by the Supreme Court.

Mr. Justice Jackson, speaking for five members of the Court, restricted the judicial function to a determination of whether the board, acting under the statute, had authority to make the order and whether there was evidence to support it. He felt that Section 2(3) of the Act left no question but that foremen are employees as there defined, and that Section 2(2) defining employer had merely the purpose of making clear for whose acts the employer would be responsible under the statute and was not intended to limit the scope of the term employee as here involved. For purposes of representing the employer a foreman may fall within the employer definition, but does not thereby lose his rights as an employee where his interests and those of the employer may be adverse, as involved in fixing his own wages, hours, et cetera. The company’s argument was thought to be primarily directed to the undesirability of permitting foremen to organize rather than its legality, and thus not a matter for judicial determination.

Apparently the company conceded the right of the foremen to organize but denied that it had any obligation to recognize or bargain with such organization. The majority felt the statute left no doubt about the board’s authority to make the determination here involved and that there was ample evidence to support its finding. There being no ambiguity in the statute, the opinion denied the validity of resort to legislative history. Whether the unionization of foremen might be bad industrial policy, as urged, was quite properly held to be beyond the province of the Court to decide.

The dissenting opinion of Mr. Justice Douglas for four members of the Court first emphasized the important policy questions posed by the majority opinion which he thought might be extended to include everyone except stockholders with the result that the opposing forces in industry would no longer be management and labor, but “the operating group on the one hand and the stockholder or bondholder group on the other.” The opinion expressed the belief that had Congress intended any such basic policy change, such purpose would have been made clear. According to Mr. Justice Douglas, the provisions of the statute above referred to should be interpreted as placing in the employer category all who act for management in formulating and executing labor policies, and in the employee group only “workingmen and laborers.”

43a. See Section 2(3) and (11), and Section 14 of the 1947 Act.
An interesting case for purposes of comparison is that of *Bethlehem Steel Co. v. New York State Labor Relations Board*[^44] in which it was held that Congress had so far "occupied the field" of labor relations by the National Labor Relations Act that when the board in the exercise of its discretion denied resort to its authority by foremen seeking collective bargaining representation, as it had done at the time the foremen groups here in question had applied to the State Labor Board to certify them, it was beyond the power of the state to apply its policy to foremen and the state board was without jurisdiction to determine that foremen constituted a proper bargaining unit.

Two cases recently presented to the supreme court the question of treating as employees, within the meaning of the National Labor Relations Act, and as appropriate units for purposes of collective bargaining, plant guards, sworn in as auxiliary military police during the war and as deputy special city police since the end of the war. The case of *National Labor Relations Board v. E. C. Atkins & Company*[^45] involved only the status of guards who were also civilian auxiliaries to the military police, organized in a union wholly separate from that representing production and maintenance employees in the plants in question, which was certified by the National Labor Relations Board as the bargaining unit. In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[^46] was considered the further fact that the guards, after being demilitarized, as they were in both cases, were deputized as city policemen for purposes of their plant guard duties, and were organized for collective bargaining purposes as a separate unit of the same union that represented the production and maintenance workers of the plant.

In both cases the employers had refused to bargain with the certified representatives on the ground that the guards were not properly to be regarded as employees within the meaning of the Act for purposes of collective bargaining and that their duties as civilian auxiliaries to the military police, or as deputy municipal police would be inconsistent with membership in a union. In both cases the lower courts[^47] refused to enforce the board’s orders directing employers to bargain.

By a division of five to four in both cases the Supreme Court sustained the validity of the board’s order. In so doing it was emphasized that, as found by the board, the guards continued to be employees of the companies for all purposes of wages, hours and conditions of work, including the matter of hire and discharge except that the military had a veto power over these matters of employment and dismissal. It was also pointed out that there had been before the board more than one hundred such cases in which bargaining units had been certified. In all cases it had been found that the relationship of employer and employee had continued substantially unchanged by militarization, in so far as the need for collective bargaining representation was concerned, and that the status as members of a union had not been found to be inconsistent with the military duties involved. Also, the Court emphasized that War Department Regulation, Circular No. 15, expressly recognized the right of auxiliary military police to be organized and to bargain collectively, the caution being asserted that they should be represented by “a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization.”

The Court found ample basis to sustain the findings of the board both as to the matter of continuing employee status and the absence of any inconsistency between membership in a union and the military status of guards. The same findings were held to be supported in the case of the guards deputized as municipal police. In both cases such guards continued to be subject to the determination of the private employers as to “wages, hours, benefits and various other conditions of work,” and were said to be properly regarded as employees within the meaning of the Act. “Nor is there any basis for the intimation that their public duties are such as to render incompatible the recognition of rights under the National Labor Relations Act.”

These cases are decided expressly on the basis of continuing status as employees of a private employer and therefore do not answer the questions arising out of unionization of purely public employees such as ordinary municipal police.

Notice should be taken in this discussion of the case of National Labor Relations Board v. Hearst Publications upholding the validity of a board order based on the determination that newsboys engaged in the

48. 67 Sup. Ct. 1274, 1282. See Section 9(b) (3) of the 1947 Act.
49. 322 U.S. 111, 64 Sup. Ct. 851 (1944).
distribution in Los Angeles of the Hearst papers are employees of the publishing company within the meaning of the Act and entitled to the benefits of organization for purpose of collective bargaining. The Court found ample evidence in the record to support the finding of the board "that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their market and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit."

The Court emphasized that the determination of employee status under a federal law with national application was not to be controlled solely by common law standards which "the courts have applied in distinguishing between 'employees' and 'independent contractors' when working out various problems unrelated to the Wagner Act's purposes and provisions," more often than not in dealing with questions of "vicarious liability in tort," and which not infrequently vary from state to state. Then the Court asserted that "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants' have been rejected in various applications of this Act both here . . . and in other federal courts. . . . There is no good reason for invoking them to restrict the scope of the term 'employee' sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. 'Where all the conditions of the relation require protection, protection ought to be given.'

The bargaining units approved by the board were made up of those who sell full-time at established spots on a regular basis, to the exclusion of the part-time, temporary, or casual distributors. The designation of such a stable group was thought by the Court to fall well within the discretion of the board under the statute.

As to both determinations the Court emphasized that Congress, in making the board's "determinations as to the facts . . . conclusive, if supported by evidence," had "entrusted to it primarily the decision whether

50. 322 U. S. 111, 131.
51. Id. at 120. But see Section 2(3) of the 1947 Act.
the evidence establishes the material facts. Hence in reviewing the board’s ultimate conclusions, it is not the court’s function to substitute its own inferences of fact for the board’s, when the latter have support in the record.\textsuperscript{53a}

D. Voting and Election of Bargaining Representatives

The case of \textit{National Labor Relations Board v. A. J. Tower Co.}\textsuperscript{53a} presented a controversy as to the procedure used in elections under the National Labor Relations Act and the propriety of the board’s refusal to accept an employer’s post-election challenge to the eligibility of a voter who participated in a consent election. The election was held under an agreement between the company and the union approved by the regional director for the board, under which the employer supplied the regional director with “an accurate list of the eligible voters, together with a list of the ineligible employees,” and time was available during which challenges could be made. Four days after the election and the tally of the ballots and certification of the results, the company reported that one of those persons certified and who voted was apparently no longer an employee at the time of the election and thus not eligible to vote. The company accordingly challenged the vote and requested a hearing. The regional director ruled that the challenge came too late and applied the general rule of the board against post-election challenges. This ruling was sustained by the board and by the Supreme Court, although the circuit court of appeals thought this matter should have been heard and determined before a basis could exist for a charge against the company for refusal to bargain with the union. The Supreme Court found the board rule as here applied to be reasonable and in accord with the familiar practice in political elections.

Mr. Justice Jackson alone dissented on the ground that anti-union employees had not had sufficient opportunity to challenge prospective voters and that their interests were not adequately protected under the board rules. This matter he considered particularly pertinent here since the question as to the one voter’s eligibility had first been raised by an employee—presumably an anti-union employee.

E. Bargaining Representatives, The Closed Shop, and Discrimination

The problem of the closed shop in one of its important aspects and the obligation of a certified bargaining representative to represent all employees

\textsuperscript{52} \textit{Id.} at 129.
\textsuperscript{53} \textit{Id.} at 130.
\textsuperscript{53a} 67 Sup. Ct. 324 (1946).
came in for consideration by the Supreme Court late in 1944 in the case of *Wallace Corporation v. National Labor Relations Board*, in an opinion that may be more important for some of its implications than for what was actually decided. In the background of the case had been a controversy resulting in a charge by a CIO union that the company was sponsoring an independent union. This controversy which had developed into a strike of some duration was settled in an agreement approved by the board and signed by both unions and the company by which an election was to be held to determine the bargaining representative. There was some indication of an understanding that the winning union was to be granted a closed shop contract. Independent won the election and a closed shop contract was entered into. Independent denied membership to 31 CIO men and demanded that the company discharge them as well as 12 other CIO men who had not applied for membership in Independent. The ensuing discharge of these men by the company was held by the board to constitute an unfair labor practice, based on the provision of the statute forbidding an employer to encourage or discourage membership in any union by discrimination with regard to hire or tenure of employment, although the same section of the statute also expressly authorizes a closed shop contract with a labor organization not established, maintained, or assisted by the company through an unfair labor practice.

In holding the discharges to be an unfair labor practice the board found that the company had signed the closed shop contract with Independent knowing of and approving the purpose of Independent to demand the discharges, thus the company could not use the contract as a protection for its actions. This appeared to be based partially on what had gone on before the settlement and election, notwithstanding the general board rule not to go back of settlement in such cases. This was justified by the Court on the basis that a subsequent unfair labor practice had been found to exist.

The majority opinion emphasized the duty of the certified bargaining agent to represent all of the employees fairly and impartially, and that no employee can be deprived of his employment because of his prior affiliation with any particular union. Said Mr. Justice Black, "We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving

them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all the workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone.  

While it may be felt, as indicated by the dissenting opinion, that the company was being put in a difficult position because it had no power to control the union’s policy of admission to membership, the majority opinion emphasizes that the matter of entry into a closed shop agreement was purely a matter of bargaining and a matter which the company was free to avoid. Said Mr. Justice Black, “the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur.”  

While the only penalty under the Act applies to the company on the basis of an unfair labor practice, a conceivably more important question, which the court found it unnecessary to pass upon, may be raised by implication. That question involves the possible illegality or unconstitutionality of the action of the union which has been authorized by federal statute to represent all of the employees in using that power to discriminate against part of those whom it is authorized to represent. If such a certified union acts illegally when it discriminates against some employees among those it is authorized to represent because of race or color, as cases shortly to be considered hold, is it not more clear of a situation where the very freedom of association sought to be guaranteed by the statute is made the basis of arbitrary discrimination?

Other discriminatory cases of a similar nature arising under the Railway Labor Act will be discussed under that heading below.

III. THE RAILWAY LABOR ACT

A. Bargaining Representatives, The Closed Shop, and Discrimination

Two cases decided the same day as the Wallace case, involving the same general type of problem, and arising under the Railway Labor Act are Steele v. Louisville and Nashville Ry. Co. and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen. Here unions which excluded

54a. 323 U. S. 248, 256.
54b. Ibid.
Negroes from membership had been designated as employee representatives under the Railway Labor Act and had made contracts with the employer railroads discriminating heavily against Negro firemen by restricting their seniority rights and completely excluding them from certain promotional employment. In sustaining the right of such Negro firemen in a suit against the union and against the railroads to enjoin enforcement of the discriminatory agreements, the Supreme Court emphasized that a labor organization chosen to represent a craft or class of employees under the provisions of the Railway Labor Act is chosen to represent all of the employees, the minority as well as the majority, regardless of their union affiliations or want of them. Said Mr. Chief Justice Stone in the Steele case, "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . . We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." The Court concluded that the statute contemplates resort to the usual judicial remedies of injunction and award of damages for breach of the duty imposed to represent fairly the whole group.

A very recent decision under the Railway Labor Act by the Supreme Court of Kansas in Betts v. Easley has reaffirmed the doctrines of these earlier cases and gone much further in asserting a constitutional right of all employees based on the Fifth Amendment to equal participation in and equal representation by the union which derives its authority to act as exclusive bargaining representative from the affirmative provisions of a Federal statute. The closed shop was not involved in this case and the Negro workmen were admitted to membership in separate lodges affiliated with the organization here designated as representative, but with rights of participation definitely subordinate to the dominant group. The claim was put forward that since membership in the union was voluntary, no right existed to complain about the limitations placed upon Negro membership. In rejecting this contention it was asserted that "This Court cannot be blind to present day realities affecting labor in large industrial

57. 323 U. S. 192, 202, 203.
plants. The individual workman cannot just 'go it alone.' Every person with an understanding of mass production and other features of modern industry long ago recognized the necessity of collective bargaining by labor representatives, freely chosen, if human rights are to be adequately safeguarded. In the Railway Labor Act, Congress gave clear and firm recognition to this necessity. This liberal and enlightened view having been written into the statute, it must follow that a union acting as the exclusive bargaining agent under the law, for all employees, cannot act arbitrarily, cannot deny equality of privilege, to individuals or minority groups merely because membership in the organization is voluntary. To hold otherwise would do violence to basic principles of our American system. . . . The acts complained of are in violation of the Fifth Amendment."

Another interesting state case of this period presenting the question whether a closed shop agreement may be enforced by a labor union, together with a closed or partially closed union membership, is that of *James v. Maripship Corporation,*

The facts of the case were quite similar to those of *Betts v. Easley* in that Negroes were permitted membership only in an auxiliary organization with restricted rights definitely inferior to those attaching to full membership in the union reserved to white employees, and the case was dealt with as the equivalent of complete exclusion of Negroes from membership, the court saying that "the fundamental question in this case is whether a closed union coupled with a closed shop is a legitimate objective of organized labor.""

While it was recognized that the ship-building industry here involved may affect interstate commerce so as to make the National Labor Relations Act applicable, and, for all that appears, the union here may or may not have been certified as the bargaining agent by the National Labor Relations Board, nothing is made to depend upon that fact, the court merely noting that the portion of the Act authorizing a closed shop contains nothing which can properly be construed as giving the union "a right to maintain a closed or partially closed membership together with a closed shop agreement.""" The case was thus decided on the basis of common law doctrines unaffected by any public status acquired by the union being

59. 161 Kan. 469.
60. 25 Cal. (2d) 721, 155 P. (2d) 329 (1945).
61. 25 Cal. (2d) 721, 730.
62. *Id.* at 735.
designated as bargaining representative under a statute as was involved in the cases discussed above.

The union had based its contentions partially on the fact that under the law of California the closed shop is lawful, and that likewise under that State's law voluntary associations such as labor unions had always been recognized as having a right to limit membership to persons mutually acceptable. But the court insisted that it did not "follow . . . that a union may maintain both a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership." In so holding the court called forth an analogy to the common law status of inn keepers and common carriers in their obligation to serve all alike. "In our opinion," said the court, "an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal organizations. Its asserted right to choose its own members . . . affects the fundamental right to work for a living." The opinion then quoted with approval from an earlier New Jersey case to the effect that "the union could either restrict its membership at pleasure or contract with employers that all work shall be given to its members but that it could not do both.

While recognizing that some cases in the past have taken the position that state legislation is necessary as a basis on which to enforce such a public policy, the California court accepted as preferable those decisions which have asserted such a public policy without statutory aid.

In sustaining a lower court injunction directed both against the union and the employer and restraining the discharge of Negro employees because not members of the union with which the employer had a closed shop agreement, the court expressly avoided passing on the question whether, in the absence of a closed shop agreement, the union would be required to open its membership to all qualified employees, regardless of color, but held that the union could not maintain both a closed shop and a closed

63. Id. at 730, 731.
64. Id. at 731.
or partially closed union, and directed that "negroes must be admitted to membership under the same terms and conditions applicable to non-negroes unless the union and the employer refrain from enforcing the closed shop agreement against them."

As against the contention of the company here involved that the restraining order should not be directed against it because of its obligation under the National Labor Relations Act to enforce the closed shop agreement without looking behind a notice from the union that a particular employee is not in good standing, the court asserted that the company had full knowledge of the facts in the controversy and by complying with the union's demands had assisted in making effective the discrimination, and, without being directed to take affirmative action or subjected to penalty for past action, it could properly be restrained as a means of making the order against the union fully effective.

These cases may well be thought to pave the way for alleviation of many of the evils alleged to exist in the closed shop from the standpoint of the best interests of the employee and his so-called "right to work" without the necessity of restrictive legislation so widely under consideration at the present time.

Another state case that may well be mentioned in connection with the matter of discrimination is *Railway Mail Ass'n v. Cors* wherein was

66. 25 Cal. (2d) 721, 745.
67. Obviously referring to this group of cases, particularly the *Wallace* and *Steele* cases, Lee Pressman, General Counsel for the CIO, in an address before a regional conference of the American Bar Association in Omaha in January, 1947, said, "the Supreme Court has in effect decided that a labor union enjoying the rights granted by the National Labor Relations Act and the Railway Labor Act to engage in collective bargaining as the exclusive representative cannot discriminate in the bargaining process against non-member employees." Then he said, "it is my belief that the obligation not to discriminate should include the obligation to accept all the employees into equal membership." It would seem that the above cases constitute a move in the direction of requiring adherence to that suggested belief.

Incidentally it might be observed that that American Bar Association meeting in Omaha devoted largely to a discussion of labor law problems and featuring a joint discussion by Mr. Pressman for labor and Robert D. Morgan of Peoria, a lawyer representing industry, on the subject of "Improving the Processes of Collective Bargaining" marked a healthy development in the legal profession in its attitude toward the solution of labor-management problems. Happily that cooperative effort on the part of lawyers representing both labor and industry to bring before the profession intelligent and fair discussion of such problems is now being repeated elsewhere. The addresses of Mr. Pressman and Mr. Morgan are published in 12 Mo. L. Rev. 1, 10 (1947). In re closed shop see Sections 8(a)(3) and 8(b)(2) of the 1947 Act.

involved a New York statute which prohibits a labor organization from
denying membership on account of race, color, or creed, or from denying
to any member equal treatment for similar reasons. This statutory pro-
vision was alleged to offend the due process of law clause of the Fourteenth
Amendment as an interference with the right of the union in the selection
of its members. Speaking for a unanimous United States Supreme Court in
upholding the validity of this statute, Mr. Justice Reed said the Fourteenth
Amendment "was adopted to prevent state legislation designed to per-
petuate discrimination on the basis of race or color. We see no constitu-
tional basis for the contention that a state cannot protect workers from
exclusion solely on the basis of race, color, or creed by an organization,
functioning under the protection of the state, which holds itself out to
represent the general business needs of employees."9

There are a few other Railway Labor Act cases that should be men-
tioned, though the doctrines asserted may well apply also under the
National Labor Relations Act.

For purposes of comparison with the anti-discrimination cases atten-
tion might be called to the more recent case of *Lewellyn v. Fleming,*9 arising under the Railway Labor Act and decided by the Tenth Circuit
Court of Appeals, in which individual seniority rights of an employee were
held to be not improperly destroyed by a collective bargaining agreement.
The court took the position that the "agreement between the Railroad
Company and the Brotherhood was made pursuant to a basic Congres-
sional policy" set forth in the Railway Labor Act, "and superseded the
prior individual contract of employment. . . . This is not an individual
grievance which falls outside the collective interest of the craft, and there-
fore outside the scope of the collective bargaining authority of the statutory
representative,"7 as in the Elgin, Joliet & Eastern Railway case referred
to below. Neither was there any discrimination involved here. The court
concluded that the "appellant has no constitutional right to insist upon
the observance of a private contract, the effect of which is to deny the
incidence of a contract entered into in furtherance of an expressed con-
gressional policy, which the Congress is free to adopt."72

69. 326 U. S. 88, 94.
70. 154 F. (2d) 211 (C.C.A. 10th, 1946). The Supreme Court denied cer-
tiorari, 67 Sup. Ct. 45 (1946).
71. Id. at 213.
72. Id. at 214.
In the case of Elgin, Joliet and Eastern Ry. Co. v. Burley the Supreme Court made it clear that the power of a collective bargaining representative under the Railway Labor Act is to make collective agreements for the future, but does not extend to the settlement of claims of employees for damages for past breach by the employer under the collective agreement, without giving the individual employee an effective voice in the settlement, or without proof that the employee has in some legally effective way authorized the bargaining agent to represent him in the settlement of such grievances.

IV. The Norris-LaGuardia Anti-Injunction Act

The case of United States v. American Federation of Musicians involving the exercise of alleged dictatorial powers by James C. Petrillo over the making of musical recordings, voluntary amateur musical performances over the air, and the employment of unnecessary stand-by musicians, in which a restraining order was sought on the ground of violation of the Sherman Anti-Trust Act, was disposed of on the basis of being a case growing out of or involving a labor dispute to which the Norris-LaGuardia Act's anti-injunction provisions are applicable. Among other things, the court said the union was merely seeking a “closed shop so far as phonograph records, electrical transcriptions and amateur musicians are concerned,” that the question of whether this involves a dispute as to a “term or condition of employment” so as to bring it within the application of the Norris-LaGuardia Act had been answered by Congress itself in the National Labor Relations Act, Section 8(3), where it says, “... nothing in... this title... shall preclude an employer from making an agreement with a labor organization... to require as a condition of employment membership therein.” Here Congress itself speaks of an agreement for a closed shop as a “condition of employment.”

The court also excluded from the application of the Sherman Act the action here by the union in demanding a contract “for a ‘closed shop’ (in a sense large enough to include a shop which excludes not only non-union workers but also machines)” on the ground that the contract is sought primarily for the workers' benefit and not for the benefit of a non-labor group, within the doctrine of the Hutcheson case discussed infra.

74a. Id. at 308.
The so-called Lea Act\textsuperscript{75} prohibiting coercive practices affecting broadcasting was passed as an immediate result of this case and was held invalid by a federal district court in Illinois,\textsuperscript{76} but very recently has been sustained as valid by the Supreme Court of the United States.\textsuperscript{77}

While this statute and the adjudications under it are distinct from and unrelated to the provisions of the Norris-LaGuardia Anti-Injunction Act and might well be taken up separately under a distinct heading, the fact that the basic labor problems involved in the cases are the same makes it not wholly inappropriate to discuss the matter here.

This statute, passed as an amendment to the Federal Communications Act of 1934, declares that "it shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means (italics supplied), to coerce, compel or constrain, or attempt to coerce, compel or constrain a licensee, (1) to employ or agree to employ . . . any person or persons in excess of the number of employees needed by such licensee to perform actual services."

James C. Petrillo, President of the Chicago Federation of Musicians, was charged with having violated this statute by (1) directing and causing three employees of Station WAAF, members of the union, to discontinue their employment, (2) directing and causing other members of the union not to accept employment, and (3) placing and causing to be placed a picket in front of the place of business of the station, all in an "attempt to coerce, compel and constrain said licensee to employ . . . in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services."

The district court held the statute invalid as in violation of the Fifth Amendment to the Constitution because of its indefiniteness and uncertainty in the definition of a criminal offense, since there is no guide by which defendant may know "the number of employees needed." Further the Act was held violative of the First Amendment as penalizing peaceful picketing merely for the purpose of disseminating the views of the defendant and the members of the union which is an exercise of the right of free speech. The Fifth and Thirteenth Amendments were thought to be violated by the restrictions upon the employment of labor, if the alleged acts of "(1)
causing three musicians to discontinue their employment; and (2) causing three musicians not to accept employment by such licensee” can be made criminal offenses under the Act. Finally, in spite of the absence of an equal protection clause applicable to the National Government, the classification as between employees and employers and as between broadcasting and other communication industries was thought to be so arbitrary as to be violative of the due process clause of the Fifth Amendment.

On its last decision day of the 1946 term, June 23, 1947, the Supreme Court reversed this decision, sustaining in general terms the constitutional validity of the statute, but did not deal with the application of its provisions to the facts of the particular case, so remanded the case to the district court. The district court had dismissed the charge against Petrillo solely on the ground that the statute was unconstitutional as written without going into the merits of the case, so the only question before the Supreme Court as the case was presented under the Criminal Appeals Act for direct review by the Supreme Court in such cases was the constitutional validity of the statute on its face, wholly without regard to its application in the particular case.

The majority opinion refuted, one by one, the bases upon which the court below had found the statute unconstitutional. First as to indefiniteness, Mr. Justice Black, speaking for the majority, admitted that “clearer and more precise language might have been framed by Congress to express what it meant by ‘number of employees needed,’” but concluded that “the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks the boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress.77a

The charge of denial of equal protection so flagrant as to be violative of the due process clause of the Fifth Amendment because not made applicable to employers or other employees than those engaged in radio broadcasting, was, apparently, not regarded too seriously by the Supreme Court, but conceived to fall within the general doctrine long familiar in the application of state police power legislation by which it is recognized that a legislature may prohibit some practice thought to give rise to particular evils without making its statute so broad as to embrace all that might have been included.

77a. Id. at 1542.
The matter of freedom of speech alleged to be involved by making peaceful picketing a crime was held to require consideration only when the application of the statute to the facts of the case came to be dealt with, and since the Court was here passing only on the constitutionality of the Act as written, the matter was not properly before the Court. The final allegation of conflict with the Thirteenth Amendment was disposed of in the same way.

Mr. Justice Reed, joined by Justices Murphy and Rutledge, dissented solely on the first ground that the Act is too vague and indefinite to be upheld as a criminal statute.

The practical application of the statute must await the further action of the lower court.77b

The issue of enjoining labor violence and the application of the Norris-LaGuardia Anti-Injunction Act came before the court in an interesting way in 1944 in the case of Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo P. & W. R. R.78 Section 8 of the statute provides that “no restraining order or injunctive relief shall be granted to any complainant . . . 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.”

The opinion of Mr. Justice Rutledge for a unanimous Court admitted that the Norris-LaGuardia Act was not intended to interfere with the power to restrain violent acts, “but one major purpose of the Act was to prevent the use of injunction improperly as a strike-breaking implement.” Here while the company had accepted the mediation services of the government it had flatly refused to accept arbitration. And while the Railway Labor Act here applicable makes it clear that arbitration is to remain on a purely voluntary basis, the express requirements of Section 8 of the Norris-LaGuardia Act were thought to make it clear that injunctive relief could not be granted since the employer had not “made every reasonable effort to settle the dispute” within the meaning of the statute by accepting voluntary arbitration.

By far the most important recent case involving the Norris-LaGuardia Act, perhaps the most important since that act’s passage, and a case without some discussion of which any survey of recent developments in

77b. See also the more general anti-featherbedding provision in Section 8(b)(6) of the 1947 Act.
78. 321 U. S. 50, 64 Sup. Ct. 413 (1944).
the field of labor law would be most incomplete, is that of United States v. United Mine Workers of America79 (Same v. John L. Lewis). Quite obviously space will not permit a detailed discussion of the five separate opinions running to approximately 130 printed pages.

The background of facts are probably sufficiently familiar to all. The mines were being operated last October (1946) under the so-called Krug-Lewis agreement of May 29, 1946, by which it was stated that the "terms and conditions of employment were (to be) controlled 'for the period of government possession.'" Lewis claimed that this agreement carried forward Section 15 of the earlier (April 1, 1945) National Bituminous Coal Wage Agreement under which "either party to the contract was privileged to give ten days' notice in writing of a desire for a negotiating conference which the other party was required to attend; fifteen days after the beginning of that conference either party might give notice in writing of the termination of the agreement, effective five days after receipt of such notice." Lewis in his letter of October 21 requested such a conference to begin November 1. While the government denied that this clause continued in effect, and denied that any power thus existed to terminate the agreement by unilateral declaration, a meeting did take place, and Lewis gave notice November 15 of termination of the agreement on November 20, which, with adherence to the formula "no contract, no work," meant for all practical purposes a strike.80

Suit was brought for declaratory judgment seeking a ruling that Lewis and the United Mine Workers had no power unilaterally to terminate the agreement, and including a request for a temporary restraining order. Such temporary order was granted restraining defendants from continuing in effect the November 15 notice, or other action to interfere with the continued operation of the mines. The strike took place as scheduled and the government filed a petition for a rule to show cause why defendant should not be punished for contempt.

The result of that trial, holding that the power of the district court to issue the restraining order in this case was not affected by either the Norris-LaGuardia Act or the Clayton Act, subjecting Lewis to a fine of $10,000.00 and the United Mine Workers to a fine of $3,500,000.00 and

79. 67 Sup. Ct. 677 (1947).
80. See Section 501(2) of 1947 Act.
issuing a preliminary injunction in terms similar to the original restraining order to remain effective until a final determination of the case, is well known.

The case was commonly expected to turn on the question of whether the anti-injunction provisions of the Clayton Act and the Norris-LaGuardia Act apply to a case in which the government is a party. The principal contention of defendants was that the orders of the district court in this case were in violation of those statutes. And while the decision of the Supreme Court, in the view upheld by the majority, held that those statutes do not apply, its sustaining of the district court's orders, except for modifying the fine assessed against the union, did not rest solely on that ground.

In the first place the majority opinion, written by Mr. Chief Justice Vinson, as his first major opinion, pointed out that although Section 20 of the Clayton Act expressly provides that "no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . ." to strike, its provisions are also "made applicable only to cases 'between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment' . . .", which properly interpreted should not apply to the Government in this case, and that the same reasoning applies to the Norris-LaGuardia Act.

This conclusion was arrived at first, by the reasoning that as a general proposition "statutes . . . that divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," and "with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."81

Then emphasizing that the Act was predicated, as set forth in its statement of policy, upon the contrast in bargaining power between the individual unorganized worker and the employer owner of property organized in corporate form under governmental authorization, and the comparative helplessness of the individual worker to exercise any actual freedom of contract in an effective way, the Court suggested that the purpose of the Act was "to contribute to the worker's '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

81. 67 Sup. Ct. 677, 686.
interference, restraint, or coercion of employers of labor, or their agents, in
the designation of such representatives... for the purpose of collective bar-
gaining. ...' These considerations, on their face, obviously,” said Chief
Justice Vinson, “do not apply to the Government as an employer or to
relations between the Government and its employees.82

Next the opinion took up Sections 4 and 13 of the Norris-LaGuardia
Act restricting application to cases “involving or growing out of a labor
dispute” and concluded that the word “person” as used in that part of the
Act defining a “labor dispute,” while not itself defined, does not, in the
absence of clearly expressed intent by Congress to the contrary, include
the Government as such person.

Finally, the opinion reinforces this conclusion by what it purports to
find in the legislative history of the Act in its passage through Congress,
which is only that the legislative history indicated “that Congress, in passing
the Act, did not intend to permit the United States to continue to intervene
by injunction in purely private labor disputes,”83 and “did not intend to
withdraw the Government's existing rights to injunctive relief against its
own employees.”84

Thus, said the Court, “we accordingly adhere to our conclusion that
the Norris-LaGuardia Act did not affect the jurisdiction of the courts to
issue injunctions when sought by the United States in a labor dispute with
its own employees.85

The contention that the Congress, in passing the War Labor Disputes
Act and rejecting Section 5 of the Connally substitute bill which would ex-
pressly have permitted issuing injunctions to restrain violations of the Act,
showed a purpose inconsistent with the Court's present construction, was
rejected by the majority, as was also the further contention that the miners
were in reality still employees of the private employers to which the Act
applied rather than government employees. “Congress intended,” said the
Chief Justice, “that by virtue of Government seizure, a mine should become,
for purposes of production and operation, a Government facility”86 and that
“for the purposes of this case, the incidents of the relationship existing
between the Government and the workers are those of governmental em-

82. Id. at 687.
83. Id. at 688.
84. Id. at 689.
85. Id. at 690.
86. Id. at 691.
ployer and employee, ..." and that "the Norris-LaGuardia Act does not apply."

A second sufficient basis was asserted by the majority opinion, and by Mr. Justice Frankfurter in his concurring opinion, for sustaining the orders of the district court, even if it should have been held that the Norris-LaGuardia Act should apply. This theory, while not altogether a new one, but one which allegedly had been used previously and for which precedents were cited, is nevertheless a somewhat confusing one by which a court appears to be pulling itself up by its own judicial bootstraps.

As preliminary to applying this theory the Court pointed out that the Government had asked "a declaratory judgment in respect to the right of the defendant to terminate the contract by unilateral action," and that Mr. Lewis' "official notice" of termination had amounted to a strike call. "Pending a determination" in the declaratory judgment proceedings "of defendant's right to take this action, the Government requested a temporary restraining order and injunctive relief. . . . In these circumstances, the district court," said the Chief Justice, "unquestionably had the power to issue a restraining order ... to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt."

After finding that the district court was right as to its finding as to both civil and criminal contempt, the Supreme Court said "if the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety."

But assuming "that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt; but we would ... affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed."

In other words, even if the Norris-LaGuardia Act did apply and it is determined that the district court had no right to issue the injunction, nevertheless while it is in the process of deciding whether that Act did

87. Id. at 692.
88. Id. at 694.
89. Id. at 695.
90. Id. at 697.
or did not apply, it could properly issue an injunctive order to maintain the status quo until the issue was finally determined, and pending that final determination any violation of that order is just as punishable as it would have been if it had been finally determined that the court was wholly unaffected by the Norris-LaGuardia Act.

It was upon this basis, and this alone, that Mr. Justice Frankfurter concurred. Presumably that is also true of Mr. Justice Jackson, though his position is not made clear by the bare statement that he joins in the majority "opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case." 92

One last aspect of the majority opinion is the holding that the fine of $3,500,000.00 on the Union is excessive and is reduced to $700,000.00, with the proviso that it must pay the remaining $2,800,000.00 "unless defendant Union, within five days after the issuance of the mandate herein, shows that it has fully complied with the temporary restraining order issued November 18, 1946, and the preliminary injunction issued December 4, 1946." This full compliance can be effected by the Union "only by withdrawing unconditionally the notice given by it, signed by John L. Lewis, President, on November 15, 1946, to J. A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of . . . November 20, . . . and by notifying, at the same time, its members of such withdrawal," 93 so that the Krug-Lewis agreement shall remain in full force and effect until the final determination of the basic issues arising under said agreement.

Mr. Justice Frankfurter in his concurring opinion made a very strong case for the proposition that the Norris-LaGuardia Act should be held to be fully applicable to this case. In so doing he quite properly approached the matter on the basis of the specific wording of the statute depriving "the federal courts of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant."

He found a labor dispute to exist as defined by the Act, and emphasized that the Act "does not deal with the rights of the parties but with the

91. Id. at 703.
92. Id. at 702.
93. On March 17, 1947, the following order was issued by the Supreme Court. "On consideration of the motion of the United States for the issuance of the mandate in these cases prior to the expiration of the 25-day period provided in Rule 34, it is ordered that the mandate issue March 20, 1947." Within the time limit prescribed it was determined that full compliance with the order had been had and the union was released from its contingent obligation to pay the additional $2,800,000.00 fine.
power of the courts," being an act "to define and limit the jurisdiction of courts sitting in equity," and found that "nothing in the Act remotely hints that the withdrawal of this power turns on the character of the parties." Rather, he asserted, "the limitation on the jurisdiction of the court depends entirely on the subject matter of the controversy." He found the controversy here to be one "growing out of a labor dispute" within the meaning of the statute, and asserted that the alleged exception found by the Court in this case was found "not in the Act but outside it."94

Such a holding he regarded as clearly inconsistent with the purposes of Congress in passing the anti-injunction acts to put an end to the possibilities of a recurrence of cases like the Debs and Railway Shopmen's injunctions.

He also found the legislative history of the War Labor Disputes Act strongly to support this conclusion, not the least important part of which was the fact that in that Act "specific remedies were formulated by Congress against interference with the Government's operation" of seized plants. Yet "the injunction," though strongly urged, "was not included."95 Said he finally, "the whole course of legislation indicates that Congress withheld the remedy of injunction. This court now holds that Congress authorized the injunction."96

Notwithstanding his very vigorous and able dissent from the majority holding as to the non-applicability of the Norris-LaGuardia Act under the circumstances of this case, Mr. Justice Frankfurter joined in "the opinion of the Court insofar as it sustains the judgment for criminal contempt upon the broad ground of vindicating the process of law."97 He argued that pending the determination of the case the court could properly maintain the status quo and punish any departure therefrom. Since admittedly the "district court had the power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process. . . . When in a real controversy (claim not obviously frivolous), such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and

94. 67 Sup. Ct. 677, 706.
95. Id. at 711.
96. Id. at 712.
97. Id. at 705.
not the personal judgment of one of the parties. This principle is a postulate of our democracy.  

Justices Black and Douglas concurred in part and dissented in part. They agreed with the majority that neither the Norris-LaGuardia Act nor the War Labor Disputes Act "barred the Government from obtaining the injunction it sought in these proceedings." Said their opinion, "the 'labor disputes' with which Congress was concerned in the Norris-LaGuardia Act were those between private employers and their employees. As to all such 'labor disputes,' the Act . . . barred relief by injunction except under very narrow circumstances, whether injunction be sought by private employers, the Government, or anyone else." To support their conclusion that Congress did not intend the Act to apply they said, "Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes," they asserted, and felt it would take specific language in the Act to make it apply.

As an apparent answer to the contention that the Government might merely take over plants so as in effect to seek an injunction for the benefit of private employers, they emphasized that the Norris-LaGuardia Act would prevent that and that Government control here is so far complete under its seizure that the miners can properly be regarded as employees of the Government.

The point as to the Norris-LaGuardia Act preventing this was, apparently, that in any pretended taking over for the benefit of private employers government control would not be genuine, the dispute in reality would be between the private employers and their employees to which the Norris-LaGuardia Act would still be applicable, notwithstanding the action of the Government. Possibly this may raise a question as to the public welfare situation involved in such a case where there has been no previous seizure by the Government and a threatened strike in coal mining, railroad operation, telephone and telegraph operation, or any other public service enterprise would very seriously affect the general public health, safety, or welfare. Suppose that the Government, moved solely by the serious conse-

98. Id. at 704, 705.
99. Id. at 713.
100. Ibid.
quences to the public, takes over the enterprise and asks for an injunction—should it be granted? Secondly, assume it is granted and then the enterprise is returned to the private owner. True we have protected the public against a tie-up with all of its disastrous effects, but we have also, in effect, decided the immediate controversy in favor of one of the parties without any consideration of the merits—something the Norris-LaGuardia Act was calculated to prevent.100a

Justices Black and Douglas dissented with respect to the matter of the fines. They agreed with the majority ruling in modifying the District Court’s decree so as to provide a coercive sanction in the form of a conditional fine, to be payable only if the union failed to obey the affirmative order of the Court, but dissented from that part of the ruling which imposed an absolute fine of $700,000.00. In so doing they referred to such cases as Gompers v. Buck Stove and Range Co.101 for the proposition that the object is “not to punish for an offense against the public, but to compel obedience to valid court orders, and where the circumstances justify unconditional punishment for past disobedience it “may well constitute an exercise of ‘the least possible power adequate to the end proposed’. . . .” Here they asserted the “‘end proposed’ was affirmative action . . . to prevent interruption of coal production pending final adjudication of the controversy,” and they thought it clear that a “conditional civil sanction (here the conditional fine of $2,800,000.00) would bring at least as prompt and unequivocal obedience to the court’s order as would criminal punishment for past disobedience.” Important among the reasons for this view was their conviction that the defendants “appear to have believed in good faith, though erroneously, that they were acting within their legal rights”.102

A second reason for objecting to the large unconditional fine was the fact that the acts of the defendants here in question were punishable as offenses under the War Labor Disputes Act, and “that act provides a maximum punishment of $5,000.00 and one year imprisonment for those who interfere with the operation of mines taken over by the United States.”103

Thus Justices Black and Douglas would have made the total fines of both Lewis and the union payable conditionally, “only in the event that full and unconditional obedience to the temporary injunction, including

100a. This whole question is moot at present since the War Labor Disputes Act, which constituted the basis for government seizure, expired by its own limitations on June 30, 1947, and the 1947 Act does not authorize such seizure.
102. 67 Sup. Ct. 677, 715.
103. Id. at 716.
withdrawal of the notice which purported to terminate the contract, is not had on or before a day certain.\textsuperscript{104}

Two members of the Court, Justices Rutledge and Murphy, dissented on all points, each writing a separate dissenting opinion.

Mr. Justice Rutledge thought the opinion of Mr. Justice Frankfurter showed conclusively that the policy of the Norris-LaGuardia Act should be applied, and that “the legislative history that he marshals so accurately, and cogently compels the conclusion that the War Labor Disputes Act... not only confirms the applicability of the earlier statute but itself excludes resort to injunctive relief for enforcement of its own provisions in situations of this sort.”\textsuperscript{105} He pointed out that “that Act expressly provides the remedies for its own enforcement. Beyond seizure of plants, mines and facilities for temporary governmental operation, they are exclusively criminal in character,”\textsuperscript{106} and clearly do not include injunctive relief.

In supplementing this reliance on legislative history, Mr. Justice Rutledge emphasized the state of the war effort at the time the War Labor Disputes Act was passed in 1943, the fact that the great body of “American workers was bending to the patriotic duty of peak production for war purposes,” and that many reasons would exist for Congress not wishing to depart from the policy of the Norris-LaGuardia Act, but rather to rely, as it plainly did, “on the added powers of enforcement expressly conferred by the Act, namely the power of seizure and the force of the criminal sanction, to accomplish the needed results.”\textsuperscript{107}

In the second place, Mr. Justice Rutledge vigorously disagreed with the proposition that punishment for contempt may stand though the Act of Congress under which the court is operating is finally construed to deny to the court the right to issue the injunction for the violation of which the contempt punishment was meted out, as sustained by the majority and as was the basis of Mr. Justice Frankfurter’s concurring opinion. “The force of such a rule,” he asserted, “making the party act on pain of certain punishment regardless of the validity of the order violated or the court’s jurisdiction to enter it as determined finally upon review, would be not only to compel submission. It would be also in practical effect for many cases to terminate the litigation, foreclosing the substantive rights involved without

\textsuperscript{104} Ib\textit{id.}
\textsuperscript{105} \textit{Id.} at 720.
\textsuperscript{106} \textit{Ibid.}
\textsuperscript{107} \textit{Id.} at 722, 723.
any possibility for their effective appellate review and determination."

He also denied that the *Shipp* case principally relied upon by the majority stood for any such doctrine, or that the doctrine of that case, properly interpreted, or of any other case, required the result here arrived at.

To follow this doctrine of the majority might well result, Mr. Justice Rutledge believed, in the nullification of fundamental constitutional rights "by the force of invalid orders issued in flat violation of the constitutional provisions securing them, and void for that reason." And in this connection he emphasized that "it was because these were so often the effects, not simply of final orders entered after determination upon the merits, but of interlocutory injunctions and *ex parte* restraining orders, that the Norris-LaGuardia Act became law and . . . the War Labor Disputes Act continued in force its policy." The effect of such orders in labor disputes, he asserted, as is well known, was "most often to break the strike without regard to its legality . . . and render moot and abortive the substantive controversy."

Mr. Justice Murphy concurred in the dissenting opinion of Mr. Justice Rutledge, and added a short separate dissenting opinion of his own, asserting that the very language of Section 4 of the Norris-LaGuardia Act, distinctly taking from the federal courts the power to issue injunctions in labor disputes, is sufficient to dispose of the case, and also felt that the possible implications of the decision "cast a dark cloud over the future of labor relations" in this country, and emphasized that while the grave economic emergency called imperatively for some effective action to break the stalemate, "the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment . . . can have tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners."

Mr. Justice Murphy's opinion that the Norris-LaGuardia Act should apply is rendered inevitable by his conclusion that the miners remained at all times private employees of private employers, "despite the temporary gloss of government possession and operation of the mines," and bear no resemblance whatever to employees of the executive departments, the independent agencies and other branches of the Government. . . . When all is

108. *Id.* at 724.
110. 67 Sup. Ct. 677, 725.
111. *Id.* at 717.
112. *Ibid*.
said and done the obvious fact remains that this case involves and grows 
out of a labor dispute between the operators and the miners.” He empha-
sized that the Government concededly could not secure an injunction in a 
private labor dispute where there had been no seizure, no matter how vitally 
the public interest might be affected, and he regarded an injunction where 
a seizure had taken place as equally contrary to the language and policy of 
the statute.

Justice Murphy also foresaw the danger of this power being employed in 
some future emergency as a basis for using seizure as a subterfuge for break-
ing all strikes in private industry, whenever a finding could be made that the 
public interest was in peril. This, he asserted, is what makes this decision 
“so full of dangerous implications for the future,” and emphasized that if 
such a policy is to be decided upon, it is the function of Congress and not 
the Court to make the decision.

Mr. Justice Murphy also dissented from the proposition that punish-
ment for contempt can be applied for violating a temporary order later de-
termined to be void. That exact situation, he felt, was an important factor 
in bringing about the passage of the Norris-LaGuardia Act calculated to 
put an end to it. While he gave pointed recognition to the asserted feeling 
that the actions of Mr. Lewis and the miners “threatened orderly constitu-
tional government and the economic and social stability of the nation,” he 
equally emphasized that the Court must obey the mandates of Congress, and 
asserted that while “a judicial disregard of what Congress has decreed may 
seem justified for the moment in view of the crisis which gave birth to this 

case, . . . such a disregard may ultimately have more disastrous and lasting 
effects upon the economy of the nation than any action of an aggressive 
labor leader in disobeying a void court order.” Thus he would have re-
versed the order of the district court in toto.

In the light of the possible implications of this case as viewed by the 
dissenting justices, and in the light of recent and proposed legislation, state 
and national, the labor injunction has again assumed an importance which 
it had not had since the passage of the Norris-LaGuardia Act.

113. Id. at 718.
114. Id. at 719.
114a. Any complete understanding of the extent to which the labor injunction is 
restored by the Labor Management Relations Act of 1947 must await its con-
struction and application by the courts.
V. THE SHERMAN ANTI-TRUST ACT

Two cases of major importance involving questions of application of the Sherman Anti-Trust Act to labor unions came to the United States Supreme Court in 1945. They are Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,115 and Hunt v. Crumboch.116 While the total problem here involved is too complicated for any exhaustive treatment in this discussion, some consideration is in order. The background of broad application of the Sherman Act to combinations of labor prior to the enactment of the Clayton Act in 1914 is well known, at least in a general way. Its application by means of the injunctive process was sought to be ended by Sections 6 and 20 of the Clayton Act in terms prohibiting the use of injunctions in "any case between an employer and employees . . . involving or growing out of a dispute concerning terms or conditions of employment," with certain limited exceptions. That these provisions, so far as apparently intended to provide a broad exemption for labor organizations from application of the Sherman Act and from control by the injunctive process, were effectively nullified by the Supreme Court in such decisions as Duplex Printing Co. v. Deering,117 Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n,118 and others is also a matter of more or less general knowledge, with the result that the extensive use and abuse of the labor injunction, particularly in the Sherman Act cases, led to the passage of the Norris-LaGuardia Anti-Injunction Act in 1932.

Then in 1940 came the decision by the Supreme Court of the case of Apex Hosiery Co. v. Leader119 in which it was emphasized by Mr. Justice Stone that the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and capital organized and directed to control the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."120 It was accordingly held that the Act was

117. 254 U. S. 443, 41 Sup. Ct. 172 (1921).
118. 274 U. S. 37, 47 Sup. Ct. 522 (1927).
119. 310 U. S. 469, 60 Sup. Ct. 982 (1940).
120. 310 U. S. 469, 493.
not intended to apply to striking employees who, by acts of violence in the conduct of a strike shut down production and prevented interstate shipment of goods by the employer, when the combination of such employees did not have a purpose to raise or fix the market price, and "did not have as its purpose restraint upon competition in the market for petitioner's product"¹²¹ and did not in fact have such effect.

The next year brought before the high Court the case of United States v. Hutcheson²²² in which an attempt was made to apply the Sherman Act to a jurisdictional strike and a boycott. Mr. Justice Frankfurter applied Section 20 of the Clayton Act, interpreted in the light of the definition of "labor dispute" written into Section 13 of the Norris-LaGuardia Act, and found that the acts involved were not unlawful "in so far as 'any law of the United States' is concerned, . . . including the Sherman Law."²²³ In finding that the acts involved were of a kind protected by Section 20 of the Clayton Act, the Court asserted that, "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 (of the Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."²²⁴ The concept involved in this statement became a factor of controlling importance in the Allen Bradley Co. case of 1945, in which the union did "combine with non-labor groups," and in which the issue was defined by Mr. Justice Black, speaking for the Supreme Court, as being "whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."²²⁵ Or stated a bit differently, "do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which the act prohibits."²²⁶

In sustaining the trial court's granting of an injunction in this case, Mr. Justice Black said, "We think Congress never intended that unions

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¹²¹ Id. at 501.
¹²³ 312 U. S. 219, 236.
¹²⁴ Id. at 232.
¹²⁵ 325 U. S. 797, 798.
¹²⁶ Id. at 801.
could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."\textsuperscript{127}

It was emphasized that in this case the employers and the union entered into bargaining agreements in which the employers agreed not to buy goods manufactured by any companies which employed other than members of Local No. 3. And while the Court recognized that such an agreement standing alone would not have been in violation of the Sherman Act, by virtue of the provisions of Section 20 of the Clayton Act, it did not stand alone in this case, but was asserted to be a single element in a "far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level."\textsuperscript{128} Then while the Court recognized that the union acting alone might have been so far successful in its efforts as to have brought about separate individual refusals by all of their employers to buy electrical equipment not made by members of Local No. 3, and might have brought about an increase in the price of the goods, still, said the Court, "so far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act (Citing the \textit{Apex Hosiery} case). But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts."\textsuperscript{129}

The Court found no indication of a purpose on the part of Congress to immunize labor unions from application of the Sherman Act when they aid and abet manufacturers and traders in violating the statute and concluded that the lower court had properly decided that the union in this case had violated the Act.

Then said Mr. Justice Black, "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is urged, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade.

\textsuperscript{127} \textit{Id.} at 808.
\textsuperscript{128} \textit{Id.} at 809.
\textsuperscript{129} \textit{Ibid.}
But the desirability of such an exemption of labor unions is a question for
the determination of Congress.\textsuperscript{130}

Finally, said the opinion, in emphasizing the conclusion that the union
had properly been determined to have violated the Sherman Act, "We know
that Congress feared the concentrated power of business organizations to
dominate markets and prices. It intended to outlaw business monopolies. A
business monopoly is no less such because a union participates, and such
participation is a violation of the Act."\textsuperscript{131}

One writer commenting on this case says, "Thus a successful campaign,
by a union that controls both the manufacturing and the installing electrical
workers in a great city, to build an unscalable tariff wall around that city,
is not illegal by reason of the union's war aims, but only because of its
choice of allies."\textsuperscript{132}

The case of \textit{Hunt v. Crumboch}, decided the same day as the \textit{Allen
Bradley Co.} case, involved the issue of "whether an organization of laboring
men violated the Sherman Act . . . by refusing to admit to membership pe-
titioner's employees, and by refusing to sell their services to petitioner;
thereby making it impossible for petitioner profitably to continue in busi-
ness."\textsuperscript{133}

Petitioner operated a freight and food products transportation business
and held a contract with the Great Atlantic & Pacific Tea Company. In the
course of a strike called by the union of the truckers and haulers in the em-
ploy of A & P in an attempt to enforce a closed shop contract, a union man
was killed and the union charged that the petitioner, who refused to union-
ize its business and attempted to operate during the strike, had been respon-
sible for the killing. The bitterness between the two continued despite the
acquittal of the member of petitioner's firm who had been prosecuted for
the murder. The union succeeded in securing a closed shop contract with
A & P, refused to accept petitioner's employees as members of the union or
to allow its members to work for petitioner with the result that A & P can-
celed its contract with petitioner. The union was likewise successful in re-
peating this performance with another company that entered into a contract
for trucking with petitioner, with the final result that petitioner's business

\textsuperscript{130} \textit{Id.} at 810.
\textsuperscript{131} \textit{Id.} at 811.
\textsuperscript{132} Dodd, \textit{The Supreme Court and Organized Labor, 1941-1945} (1945) 58
\textit{Harv. L. Rev.}, 1018, 1051.
\textsuperscript{133} 325 U. S. 821, 822.
was wholly destroyed. The elimination of petitioner's service did not affect the interstate business of A & P or the other company except to necessitate contracting with union truckers.

In holding that the Sherman Act had not been violated here, Mr. Justice Black, speaking for a sharply divided Court of 5 to 4, distinguished the Allen Bradley case by pointing out that "the only combination here ... was one of workers alone and what they refused to sell petitioner was their labor." He pointed out that "Congress in the Sherman Act and the legislation which followed it manifested no purpose to make any kind of refusal to accept personal employment a violation of the Anti-trust laws."

Distinguishing the situation here from that involved in the Steele, T unstall, and Wallace Corporation cases previously discussed, standing "for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent," the Court said even if the record should show such discrimination here, "Congress has indicated no purpose to make a union's breach of duty to employees in a collective bargaining group, an infraction of the Sherman Act." Problems of a nature quite similar to those dealt with in the Allen Bradley and Crumboch cases, though involving in an important way provisions of the Norris-LaGuardia Act as controlling applicability of the Sherman Act, and disposed of in a way calculated to restrict very greatly the application of the Allen Bradley doctrine, were presented to the Supreme Court in 1947 in the case of United Brotherhood of Carpenters and Joiners of America v. United States. Here several defendants had been convicted below, prior to the decisions by the Supreme Court in the Allen Bradley and Crumboch cases, on charges of conspiracy to violate the Sherman Act by attempts to monopolize interstate commerce in millwork and patterned lumber in the San Francisco Bay area. The parties to the alleged conspiracy were of two groups. Local manufacturers of and dealers in the lumber products in question and their incorporated trade associations and officers thereof made up one group, while unincorporated trade unions and their officials or business agents made up the other. The alleged purpose and effect was to prevent out-of-state manufacturers from shipping and selling these commodities in the San Francisco Bay area of California, to prevent dealers in

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134. Id. at 824.
135. Id. at 824, 825.
136. Id. at 826.
137. 67 Sup. Ct. 775 (1947).
that area from handling such out-of-state products, and to raise the prices. The mechanism by which this was to be effected was a contract setting up a wage scale for members of the labor unions working on the products in question, combined with a provision that "no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by saw mills, mills or cabinet shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement."

This agreement as enforced to result in higher wages, higher prices and profits, and the exclusion of manufacturers against whom directed from sharing in the Bay Area business, "to the price disadvantage of the consumer and the unreasonable restraint of interstate commerce," was said to fall within the general scope of the Allen Bradley doctrine as a violation of Section 1 of the Sherman Act, but the more serious question involved had to do with the application of Section 6 of the Norris-LaGuardia Act and its possible shield to prevent effective application of the Sherman Act.

Section 6 provides that "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."

The majority opinion of Mr. Justice Reed, speaking for five members of the Court, said the purpose and effect of this section of the Norris-LaGuardia Act was to "relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

The reason for this enactment was said to be the previous holding in a conspiracy under the Sherman Act that "both the unions and their members (were) liable for all overt acts of their co-conspirators ... whether the members or the unions approved of the acts or not or whether or not

138. Id. at 780.
the acts were offenses under the criminal law." And while since enactment of the Section participants in a conspiracy covered by it are "not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they are now protected against liability for unauthorized illegal acts of other participants in the conspiracy. 140

The term "authorization" as used in Section 6 was said to mean something different from corporate criminal responsibility for acts of officers and agents in the course or scope of employment, and to have the effect of restricting "responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority . . . , to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence. 141

It was pointed out that instructions consistent with this interpretation had been requested in the case and refused, and such refusal was held to have been reversible error, in much the same way that failure to give a reasonable doubt instruction in a criminal case would be.

The Court said this did not mean that such an association or organization must have given explicit authority to its officers or agents in a labor controversy to violate the Sherman Act or to give approval to such an act done, and that it could not escape responsibility by standing orders disavowing authority to make agreements in violation of such statute.

Mr. Justice Frankfurter, with whom concurred The Chief Justice and Mr. Justice Burton, dissented 142 very vigorously, asserting that "to assure immunity to powerful unions collaborating with employers' associations in disregard of the Sherman Law, was not the purpose of Section 6 143 of the Norris-LaGuardia Act, as would be the effect of the interpretation employed by the majority. This provision was directed, he

140. 67 Sup. Ct. 775, 780.
141. Id. at 781.
142. Mr. Justice Jackson did not participate in the case.
143. 67 Sup. Ct. 775, 787.
asserted, against abuse by some of the federal courts in the misapplication of the law of agency so that labor unions were held responsible for the conduct of individuals in whom was lodged no authority to wield the power of the union. "By undue extension of the doctrine of conspiracy, whereby the act of each conspirator is chargeable to all, unions were on occasion held responsible for isolated acts of individuals, believed in some instances to have been agents provocateurs who held spurious membership in the union during a strike. Congress," his opinion ran, "merely aimed to curb such an abusive application of the principle of agency. It did not mean to change the whole legal basis of collective responsibility. By talking about 'actual authorization', Congress merely meant to emphasize that persons for whose acts a corporation or a union is to be held responsible should really be wielding authority for such corporation or union."\(^{144}\)

The only thing that Congress was seeking to do, according to this dissenting opinion, was to put an end to this abuse of some courts by which "organizations were held responsible not for acts of agents who had authority to act, but for every act committed by any member of the union merely because he was a member, or because he had some relation to the union although not authorized by virtue of his position to act for the union in what he did. . . . 1932 was too late in the day for Congress not to have known that unions, like other organizations, act only through officers, and that unions do not, any more than do other organizations, explicitly instruct their officers to violate the Sherman Law. Neither by inadvertence nor on purpose did Congress remove the legal liability of organizations for the conduct of officials who, within the limits of their authority, wield the power of those organizations."\(^{145}\)

It was also emphasized, as admitted by the majority, that the provisions of Section 6 apply in the same manner to labor unions and to corporations in cases involving labor disputes, and that the present interpretation of the majority, "practically speaking . . . serves to immunize unions . . . as well as corporations involved in labor disputes, from Sherman Law liability."\(^{146}\)

With the rather obvious lack of clarity in the majority opinion, this case certainly has serious possibilities by way of restricting the practical application of the Sherman Act under the doctrine of the \textit{Allen Bradley} case.\(^{146a}\)

\(^{144}\) \textit{Ibid.}\(^{145}\) \textit{Id. at 788.}\(^{146}\) \textit{Id. at 789.}\(^{146a}\) See Section 2(13) of the 1947 Act.
VI. THE ANTI-RACKETEERING ACT

The Anti-Racketeering Act of 1934,\textsuperscript{147} providing that "any person who, in connection with . . . trade or commerce . . . obtains or attempts to obtain, by use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable consideration . . ., not including, however, the payment of wages by a bona-fide employer to a bona-fide employee . . ." shall be subject to the penalties of the Act, was denied application to a labor union in the case of \textit{United States v. Local 807 of International Brotherhood of Teamsters, Chauffers, Stablemen and Helpers of America.}\textsuperscript{148}

In a criminal proceeding seeking to apply this statute to the prosecution of Local 807 and several individual members of the Union, the defendants had forced operators of trucks hauling merchandise in interstate commerce into New York City to pay a sum amounting to union wages for a full days work for each truck entering the city regardless of whether the operators accepted the services of union truck drivers within the city or not. In an opinion by Mr. Justice Byrnes the Supreme Court held that as to drivers who actually proffered their services and were willing to work for the operators the exemption for "bona-fide employees" would apply and they were not guilty of violating the Anti-Racketeering statute, notwithstanding the coercion used in securing the payment which they regarded as necessary for the protection of the interests of the Union. This conclusion was thought to be required by the purpose of the statute based on a careful consideration of its legislative history. Mr. Justice Byrnes was careful to point out that such activities were not beyond the reach of federal legislation directed to it, or beyond the power of the state and local authorities to punish acts of violence.\textsuperscript{148a}

VII. THE SELECTIVE SERVICE AND TRAINING ACT

A problem that may be of less importance now than some months ago, but which is still of some practical concern, has to do with the much-disputed

\textsuperscript{147} 18 U.S.C.A. 420a.

\textsuperscript{148} 315 U. S. 521, 62 Sup. Ct. 642 (1942).

\textsuperscript{148a} This Act was amended in 1946 directly as a result of the Supreme Court decision in the Local 807 case, adding the following: "Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony." Definitions of the terms "robery" and "extortion" were also included. See page 405 of U. S. Code Congressional Service, 79th Congress, Second Session, 1946. Also see page 1360 for explanation.
question of super-seniority under the Selective Training and Service Act of 1940 for veterans returning to jobs which they held before entering the armed services of their country. The leading case on that is Fishgold v. Sullivan Drydock & Repair Corporation.\textsuperscript{149}

The employee, Fishgold, whose rights were involved in this case was re-employed by the company at his former job after his return from the armed service in full compliance with the provisions of the statute, and was given the same seniority that he would have had if he had continued his employment without a break during the whole time he was away in the service of his country.

A collective bargaining agreement between the company, Fishgold's employer, and a union recognized as the exclusive collective bargaining agent, contained a common type of seniority clause providing that, "Promotions and reclassifications and increases or decreases in the working forces shall be based upon the length of service and ability to do the job. Whenever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

As work at the company's shipyards decreased and it became necessary to lay off employees, such lay-offs were made in accordance with this seniority clause and Fishgold was laid off for a period of nine days while non-veterans with greater seniority were continued on the job.

The decision to lay off Fishgold was based on an arbitrator's determination that the seniority clause required it and that as so interpreted the seniority clause did not conflict with the provisions of the Selective Training and Service Act, Section 8 (b) B, and (c), requiring reemployment in a "position of like seniority, status, and pay . . . ;" and further providing that such returned veteran "shall not be discharged from such position without cause within one year after such restoration." In a suit for a declaratory judgment as to his rights, and for compensation for the days laid off, the district court gave Fishgold judgment for the nine days' pay, on the ground that he had been laid off in violation of the statute. This holding was based on absence of a clear showing that the non-veterans permitted to work had greater seniority than Fishgold and not squarely on the super-seniority conception advanced by the ruling of the Director of Selective Service.

The Supreme Court, in an opinion by Mr. Justice Douglas, construed the provisions of the statute, especially that prohibiting "discharge" with-

\textsuperscript{149} 328 U. S. 275, 66 Sup. Ct. 1105 (1946).
out cause within a year which Fishgold claimed protected him also from "lay-off" for a like period, and came to the conclusion that Congress had no purpose to destroy existing seniority systems but rather to protect the returned veteran in his seniority rights the same as if there had been no break in his employment. But, said the Court, "we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. . . . Congress made the restoration as nearly a complete substitute for the original job as possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provision for restoration without loss of seniority to his old position or to a position of like seniority mean no more."150

In like manner the Court found that the guarantee that he shall not be "discharged from such position" was not intended to provide "a gain or step-up in seniority."151

The position to which the veteran is restored, said the Court, "is the position which he left plus cumulated seniority." Continuing, the Court asserted, "Congress recognized . . . the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. . . . What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."152

One of the principal arguments in the case for a different result was based on an administrative interpretation by the Director of Selective Service to the effect that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority," plus the fact that Congress had amended the Act in 1944 and extended it in 1945, without change, and knowing of this administrative interpretation, therefore, Congress in effect gave approval to that interpretation and thus read it into the statute.

Two answers to this contention were supplied by the Court. One was that such an interpretation is not consistent with either the wording or the

150. 328 U. S. 275, 285, 286.
151. Id. at 286.
152. Id. at 287, 288.
history of the statute and so could not preclude the Court from placing its own interpretation upon the provisions in question, and second, there was a second and contrary administrative interpretation rendered by the National War Labor Board in an adversary proceeding in a dispute case.\textsuperscript{153} Aside from the fact that an interpretation thus rendered by "administrative agencies entrusted with the responsibility of making \textit{inter partes} decisions" are recognized as being entitled to superior weight as compared with other types of administrative determination, it is clear that Congress was faced at least at the time of its 1945 extension, with conflicting administrative interpretations which would preclude the conclusion that Congress had preferred one over the other.

There was no indication that any member of the Court disagreed with this conclusion denying the super-seniority contended for, though Mr. Justice Black dissented on procedural grounds, holding that the appeal to the Circuit Court of Appeals should have been dismissed "because the Union was not a proper party to appeal."

Very recently the case of \textit{Trailmobile Co. v. Whirls}\textsuperscript{154} raised the question whether the seniority rights which the \textit{Fishgold} case determined were protected to the veteran by Section 8 of the Selective Training and Service Act were guaranteed merely for one year or indefinitely. The facts of the case are clear to the extent that the Highland Body Manufacturing Company of which Whirls was a returned veteran employee was a wholly owned subsidiary of the Trailmobile Company and that the two were consolidated under the name and complete control of the latter as a single corporation. When the employees of the smaller Highland Company were transferred to the payroll of the larger Trailmobile Company a controversy arose as to relative seniority. The former insisted on retaining seniority as of their original hiring by Highland, the latter that such seniority with Trailmobile should date from the consolidation. Both groups had been affiliated with American Federation of Labor and the dispute submitted to national representatives of that organization was decided in favor of Highland. Thereupon the more numerous original Trailmobile employees reorganized as a C.I.O. affiliate, won an election and secured a closed shop contract as of July 1944 which provided for dating seniority rights of the former Highland employees from the date of consolidation. Whirls had returned from the service in May 1943 and had been properly reinstated in his former job with seniority, which

\begin{itemize}
  \item \textsuperscript{153} Scovill Mfg. Co., 21 W.L.R. 200 (1944).
  \item \textsuperscript{154} 67 Sup. Ct. 982 (1947).
\end{itemize}
was not disturbed until this new contract went into effect fourteen months later. Thus, so far as the Selective Training and Service Act was concerned, if its guarantees applied for only one year as contended by the union and the company, it could not control this case. Whirls and the Government contended that the guarantees of the Act relating to seniority do not end with the expiration of one year after reinstatement but apply so long as the employment continues. There was some confusion relative to alleged discriminatory treatment involved in later transfers, and also as to whether the closed shop provision went into effect in July 1944 or not until the second C.I.O. contract in 1945, but in any event, Whirls' job and rate of pay based on seniority were not disturbed until September 1945, substantially more than two years after his reemployment as a returned veteran. Suit was brought by Whirls to enjoin a threatened decrease in pay and change in his seniority status and to obtain reinstatement to his former position and to his former seniority. As a subsequent transfer gave him a rate higher than his original position, the sole issue dealt with was one of seniority.

The provision of the Selective Training and Service Act whose application is drawn in question is Section 8 (c) which reads as follows: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (requiring restoration to the former position or to one of like seniority, status, and pay) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, and shall not be discharged from such position without cause within one year after such restoration."

In an opinion by Mr. Justice Rutledge, speaking for seven members of the Court, and denying the indefinite guarantee contended for, it was pointed out that the contention of the Government would have the effect of freezing the incidents of the employment indefinitely, so long as the employment continues, while freezing the right to the job itself for only one year. This was thought to be inconsistent with the language of the statute and with the purpose of Congress, and also inconsistent with the doctrine of the Fishgold case which in effect amalgamated all of the employee's rights and protected them under the provision against discharge when it held that the wording and purpose of the statute gave "security not only against complete discharge, but also against demotion, for the statutory year. And demotion

155. 50 U.S.C.A. Appendix, 308 (b) and (c).
was held to mean impairment of ‘other rights’, including his restored statutory seniority for that year.\(^\text{156}\)

The effect of the Government’s contention, it was said, would be that “The reemployed veteran... not only would be restored to his job simply as the Fishgold case required, ‘so that he does not lose ground by reason of his absence’... He would gain advantages beyond the statutory year over such non-veteran employees,” while the purpose of Congress was merely to see that the service men would return to civilian life “without prejudice because of their service.”\(^\text{157}\) The principle involved in the denial of the claimed superseniority rights in the Fishgold case was thought to require the denial of the government’s contention here.

The majority opinion negatived the existence of any indication of discrimination against Whirls as a veteran or otherwise, at least until after the decision of the case by the Circuit Court of Appeals which was not properly up for consideration, so found it unnecessary to pass upon the contention of the company and the union that all protection afforded by the Act terminates with the end of the specified year. Accordingly it was decided merely that so much of the protection of the act ends with the end of the year “as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration. We expressly reserve decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker.”\(^\text{158}\)

The dissenting opinion of Mr. Justice Jackson, concurred in by Mr. Justice Frankfurter, appears to be predicated upon an assumption that Whirls was being discriminated against because of his veteran status, the correctness of which assumption was negatived in the majority opinion, and was hardly clearly borne out by the facts recited in the dissenting opinion.

Referring to the nature of the employee’s rights and the extent of the statutory protection as asserted by the Fishgold opinion, Mr. Justice Jackson said, “where employees have no seniority rights, the guarantee of one year’s employment is their only right. But if a seniority system does exist, the Congress gave the employee ‘protection within the framework of the seniority system plus a guarantee against demotion or termination of the employ-
ment relationship without cause for a year. This would seem to mean that he gets merely such seniority rights as non-veteran employees with initial employment dating from the same time have, no more and no less, except for the one year limitation on discharge or demotion, and in no way calls for application of this statute beyond the one-year period. The opinion does not then say that those seniority rights, unlike the right to the job, must necessarily last indefinitely, as contended for in the case, but rather shifts its position to one of emphasizing that the action by which seniority rights were taken away in this case was improper and inconsistent with the principles asserted by the Court in such cases as the Steele and Tunstall cases discussed above holding acts by union representatives illegal by reason of discrimination.

If the action here was directed against Whirls by reason of his status as a veteran, then the Court would need to decide the issue reserved by the majority opinion and determine whether the Selective Training and Service Act could properly be invoked for protection after the expiration of the year. However, if the discrimination was not based on veteran status, as appears to be the case, but was merely otherwise of questionable justification, it seems that the problem would not call for application of that statute but would rather call for a determination of whether the alleged discrimination falls within the doctrine of the Steele and Tunstall cases protecting minority groups against discriminatory treatment by the certified bargaining representative, or within the doctrine of Lewellyn v. Fleming, also discussed above, as a permissible destruction of individual seniority rights in the execution of a contract for the whole group. There seems reason to believe that the Steele and Tunstall doctrine may be the proper one to apply. While those cases were decided under the Railway Labor Act, there seems to be no reason to believe that the same principles are not equally applicable under the National Labor Relations Act which is involved here.

As a matter of fact, even if discrimination had been based on veteran status, it is not at all clear that the same doctrine may not properly be invoked for protection, entirely aside from the possible application of the Selective Training and Service Act.

159. Id. at 995.
VIII. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938, among other things, provides for the payment of time and one half for overtime in excess of 40 hours per week, and for the regulation of minimum wages to be paid by employers to employees "engaged in commerce or in the production of goods for commerce" (meaning interstate or foreign commerce) and provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

The constitutional validity of the Act in its general provisions was fully sustained in 1941 in *United States v. Darby* \(^{163}\) and *Opp Cotton Mills v. Administrator of Wage and Hour Division*,\(^ {164}\) but the extent of its coverage, the scope and details of its application, and the extent of the reach of the commerce power as thus applied has continued to give rise to much important litigation, and a large number of cases worthy of special note fall within the period here under consideration but limitations of space preclude discussion of more than a few.

In *Kirschbaum v. Walling*,\(^ {165}\) firemen, elevator operators, watchmen and other similar employees in buildings the occupants of which manufactured clothing principally for interstate markets were held to be properly included within the scope of the Act and thus sufficiently related to interstate commerce to be brought within the regulatory power of Congress. The Court asserted that "without light and heat and power" provided by the employees in question "the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." Further the Court asserted that it was not essential that "employees must themselves participate in the physical process of making the goods before they can be regarded as engaged in their production," and concluded that the work of these employees "had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'," within the meaning of the Act of Congress. The Court here emphasized that the provisions of the Act expressly make its applica-

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163. 312 U. S. 100, 657, 61 Sup. Ct. 451 (1941).
tion dependent upon the character of the employee's activities and not on whether the employer is engaged in interstate commerce. If there had been any initial feeling that the wording "in any process or occupation necessary to the production" of goods for commerce in bringing within the application of the statute employees not actually producing or working on goods to be shipped in interstate commerce was to be restricted to employees of business enterprises actually engaged in the production of goods for shipment in interstate commerce, the Kirschbaum case made it clear that the Act was destined to have a much broader application.

In like manner to the Kirschbaum case, similar maintenance employees attached to a building, owned by the Borden Milk Company, seventeen of the twenty-four stories and 58% of the rentable area of which building were occupied by the Borden Company's executive and administrative employees engaged in directing, controlling, and administering the whole enterprise of the company, which consisted in manufacturing various milk products and shipping them in interstate and foreign commerce, were held in the case of Borden Co. v. Borella166 to come within the scope of the Fair Labor Standards Act.

For purposes of comparison it is interesting to note that the Court in 10 East 40th Street Bldg. v. Callus167 denied application of the same statute to the maintenance employees of an ordinary office building devoted to the housing of the usual miscellany of offices, despite the fact that 42% of the rentable area and 48% of the rented area was occupied by executive offices, sales agencies, et cetera, of concerns engaged in interstate commerce. The distinction from the Kirschbaum v. Walling and Borden cases was said to lie in the difference between a building devoted to manufacture for commerce or one owned by an interstate producer and predominantly occupied by its offices, and an ordinary office building, a substantial portion of whose tenants chanced to be engaged in interstate commerce. "Running an office building as an entirely independent enterprise," said the Court, "is too many steps removed from the physical process of the production of goods."168

Other cases quite similar to Kirschbaum v. Walling and Borden Co. v. Borrela are Martino v. Michigan Window Cleaning Co.,169 holding that

168. 325 U. S. 578, 583.
employees of a company engaged in window cleaning, painting, and maintenance work in industrial plants for customers engaged in the production of goods for interstate commerce, such services being necessary to the production of the goods produced within those plants, are properly brought within the application of the Fair Labor Standards Act, and Roland Electrical Co. v. Wal-ling,\textsuperscript{170} holding the same as to employees of a company engaged in repairing and reconditioning electric motors for customers producing goods for interstate commerce. Worthy of notice also is Warren-Bradshaw Drilling Co. v. Hall,\textsuperscript{171} applying the Act to members of a rotary drilling crew employed by an independent oil well drilling contractor, who had no interest in the oil leases involved, and where the drilling went only to an agreed depth short of the sand stratum containing the oil, since they were engaged in a "process or occupation necessary to the production" of oil for interstate commerce. So also in Overstreet v. North Shore Corporation\textsuperscript{172} as to employees engaged in maintaining and operating a toll road and drawbridge over a navigable waterway where both the road and bridge were used extensively by persons and vehicles traveling in interstate commerce. In both of these cases the statute is applied to acts somewhat further removed in point of time from the actual work of production, though the line of causation may properly be regarded as sufficiently direct.

Two other cases, Walton v. Southern Package Corp.\textsuperscript{173} and Armour and Co. v. Wantock,\textsuperscript{174} applied the Act to night watchmen and a private firefighting force, although the maintenance of the latter was not indispensable to continued production.

A more recent case decided in 1946, D. A. Schulte, Inc. v. Gangi,\textsuperscript{175} also valuable for comparison on this point, held the Fair Labor Standards Act applicable to service and maintenance employees of a building that was tenanted largely by occupants who receive, work on, and return in interstate commerce goods belonging to non-occupants who subsequently in the regular course of their business ship substantial portions of the occupant's products to other states, which fact was reasonably anticipated by the occupants. Also this case involved an important problem as to compromise of the matter of coverage of the Act. In fact the Court asserted that the

\textsuperscript{170} 326 U. S. 657, 66 Sup. Ct. 413 (1946).
\textsuperscript{171} 317 U. S. 88, 63 Sup. Ct. 125 (1942).
\textsuperscript{172} 318 U. S. 125, 63 Sup. Ct. 494 (1943).
\textsuperscript{173} 320 U. S. 540, 64 Sup. Ct. 320 (1944).
\textsuperscript{174} 323 U. S. 126, 65 Sup. Ct. 165 (1944).
\textsuperscript{175} 328 U. S. 108, 66 Sup. Ct. 925 (1946).
most important issue in the case was "whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the coverage of the Act on a claim for overtime compensation and liquidated damages where the employee receives the overtime compensation in full." Said Mr. Justice Reed, speaking for the majority of the Supreme Court, "we think the purpose of the Act ... to secure for the lowest paid segment of the Nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage. Such a compromise thwarts the public policy of minimum wages, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages." The policy of the Act to prevent an employee from waiving his claim to liquidated damages, as distinct from his claim to the statutory wages, had already been asserted by the Court in the case of *Brooklyn Bank v. O'Neil* where the employer, some two years after the employee left his service, gave to the employee a check for the amount of overtime pay due under the statute and received in return a release signed by the employee purporting to waive all further claim under the statute to recover liquidated damages. That case also denied the right of the employee to recover interest on the amount due as wages and liquidated damages, since Congress itself had seen fit to fix the sums recoverable for delay, and to allow interest would have the effect of giving double compensation for damages arising from delay in the payment of the basic minimum wages. The case of *Fitzgerald Construction Co. v. Pedersen* decided the same day was to the same effect.

Since the Act is applicable to employees "engaged in commerce" as well as to those producing goods for commerce, it sometimes becomes necessary to determine when commerce begins and ends. Thus in the case of *Walling v. Jacksonville Paper Co.* the Court held that paper products received at seven branch houses from interstate shipments where they were...

176. 328 U. S. at 110.
177. Id. at 116.
unloaded into the warehouses and checked and then delivered wholesale to the customers for whom they had been ordered were in interstate commerce throughout until delivered to the customers, although none of the deliveries from these warehouses went across state lines, and that the employees working at these seven branch houses were properly subjected to the application of the Fair Labor Standards Act.

This situation is to be distinguished from that in the case of *Higgins v. Carr Brothers Co.*\(^\text{181}\) decided the same day, where Carr Brothers Company conducted a wholesale fruit and grocery business at Portland, Maine, buying its merchandise from local and out of state producers, had it all delivered to its warehouse and then sold and distributed it to local retailers. The interstate commerce was held to come to an end with delivery into the wholesaler's warehouse and Higgins, employed as a night shipper putting up orders and loading trucks for delivery to local retail dealers or driving a truck making deliveries, was held not to be a proper subject for application of the Fair Labor Standards Act. The absence of prior sales was important in bringing the interstate commerce to an end when the merchandise was delivered into the wholesaler's warehouse, though that factor was not emphasized by the Court, and the further fact that the dealer here was operating in competition with wholesalers doing an interstate business was regarded as wholly immaterial since the Fair Labor Standards Act, unlike such federal legislation as the National Labor Relations Act, does not apply to business "affecting commerce."

Several cases have dealt with problems of employee status under the Fair Labor Standards Act aside from the general questions of coverage dealt with above. The issue of employee or independent contractor was raised in *Rutherford Food Corp. v. McComb*\(^\text{182}\) with respect to beef boners using the premises and equipment of a slaughter house for the special boning job performed on the production line in close relationship to other slaughter house activities and under close supervision of the slaughter house management. The lower court, whose judgment was affirmed by the Supreme Court, found that the whole of the operations at the slaughter house constituted an integrated economic unit devoted primarily to the production of boneless beef, that the boners work alongside admitted employees of the plant operator at their tasks, and asserted that "the task of each is performed in its natural

\[\text{181. 317 U. S. 572, 63 Sup. Ct. 337 (1943).}\]
order as a contribution to the accomplishment of a common objective." Therefore, in spite of an arrangement made with a single individual by which he was to assemble skilled boners to do the boning work and to be paid by the hundredweight of boned beef and the individual boners were to share equally in the boning money, the Supreme Court affirmed that the "underlying economic realities ... lead to the conclusion that the boners were ... employees" of the slaughter-house operator rather than employees of an independent contractor.

Trainees who accepted an opportunity offered by a terminal company to learn the duties of brakeman and who, by qualifying for the work and being placed in a reserve pool from which the company could draw additional employees as needed, were retroactively paid $4.00 per week for the training period, but were otherwise not compensated, were held by the Supreme Court in Walling v. Portland Terminal Co.\(^\text{183}\) not to be employees within the meaning of the Fair Labor Standards Act. In so holding the Court observed that "the Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage," but broad as the definitions of "employ" and "employee" may be in the statute "they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."\(^\text{184}\)

The problem of industrial home work in the embroidery industry as it affects the administration of the Fair Labor Standards Act and the matter of wage determination thereunder came in for consideration by the Supreme Court in the case of Gemsco v. Walling\(^\text{185}\) in 1945. The finding by the Administrator that he could not otherwise enforce a minimum wage as to homeworkers employed in the industry led the Court to sustain an order entirely prohibiting such home work under the statutory authorization to the Administrator to include in wage orders "such terms and conditions" as he "finds necessary to carry out the purposes of such orders" and to "prevent circumvention or evasion." The majority of the Court felt that the

\(^{183}\) 67 Sup. Ct. 639 (1947).

\(^{183}\) 67 Sup. Ct. 639 (1947).


\(^{185}\) 324 U. S. 244, 65 Sup. Ct. 605 (1945).
showing of necessity as a means of making the order effectively and practically operative was sufficient to justify the holding that the Administrator had not exceeded his proper discretion in the issuance of such an order.

The problem of whether or not tips may be included as a part of wages in the case of redcap employees of a railroad terminal company for purposes of meeting the minimum wage requirement of the Fair Labor Standards Act was before the Court in the case of Williams v. Jacksonville Terminal Co.\textsuperscript{186} Five members of the court took the position that the arrangement entered into between the Terminal Company and the redcaps (perhaps not too enthusiastically by the latter) by which all tips were to be accounted for and credited to the company for purposes of meeting the statutory minimum wage requirement, with the proviso that any excess above the wage minimum was to be retained by the redcaps, was not invalid. In so holding the attitude seemed to be that by virtue of this arrangement the employer might keep “all earnings arising from the business,” tips included. Three justices dissented on the ground that the statute imposes upon the employer the duty of paying the minimum wage and that to divert the tips, which the traveling public intend to give to the redcap, to the employer company is not consistent with the purpose of the statute.

Space will not permit a detailed discussion in this limited survey of the several cases which have dealt with the matter of determining what is to be considered the “regular rate on the basis of which overtime is to be computed where employees are paid otherwise than on a straight hourly basis. Suffice it to say here perhaps that cases like Overnight Motor Transportation Co. v. Missel,\textsuperscript{187} making it clear that pay by the week is covered by the statute, such pay to be reduced by some method of computation to hourly rates, with such cases as United States v. Rosenwasser\textsuperscript{188} establishing the applicability of the statute to piecework rates, and cases like Walling v. Youngerman-Reynolds Co.\textsuperscript{189} and Walling v. Harnischfeger Corporation\textsuperscript{190} requiring incentive rates to be treated as part of the regular rate for purposes of application of the statute, have become established parts of the judicial development of the law. The case of Walling v. A. H. Belo Corporation,\textsuperscript{191} decided at the same time as the Missel case introduced an element of con-

\textsuperscript{186} 315 U. S. 386, 62 Sup. Ct. 659 (1942).
\textsuperscript{187} 316 U. S. 572, 62 Sup. Ct. 1216 (1942).
\textsuperscript{188} 323 U. S. 360, 65 Sup. Ct. 295 (1945).
\textsuperscript{189} 325 U. S. 419, 65 Sup. Ct. 1242 (1945).
\textsuperscript{190} 325 U. S. 427, 65 Sup. Ct. 1246 (1945).
\textsuperscript{191} 316 U. S. 624, 62 Sup. Ct. 1223 (1942).
fusion by permitting use of the device of a guaranteed weekly wage applicable to work weeks of fluctuating length and the use in addition of a so-called regular hourly rate, thus somewhat modifying the doctrine of the other cases. The Belo case was made the basis of an attempt to set up an ingenious split-day method of compensation with so-called regular and overtime rates so calculated as to continue in effect the same compensation for overtime work weeks which had been in effect before the statute, which was held violative of the statute by a unanimous Supreme Court in Walling v. Helmerich and Payne. On the basis of this decision and those in the Youngerman-Reynolds Hardwood Co. and Harnischfeger Corporation cases there was some suggestion that the doctrine of the Belo case had been repudiated, but it was reaffirmed in 1947.

In the case of Walling v. Halliburton Oil Well Cementing Co. a weekly guarantee pay plan similar to that involved in the Belo case was applied to the business of cementing, testing and servicing oil wells which required the keeping of a stabilized group of skilled and specially trained employees, but the volume of work was so far inconstant that the employees worked a variable number of hours from day to day and week to week, the latter ranging from 30 to 100 hours. The plan called for the payment of a basic hourly rate at or above the statutory minimum for the first 40 hours of any work week and not less than 1 1/2 times such basic hourly rate for all time over 40 hours in any work week with a guarantee that the employee should receive not less than a specified amount for each week. This was sustained as valid, in spite of the fact that the hourly rate was so related to the guaranteed flat amount that the employee became entitled to more than that weekly guarantee only when he worked in excess of 84 hours per week.

While the Halliburton case thus reaffirms the Belo case, both are distinguished and perhaps somewhat limited in 149 Madison Avenue Corporation v. Asselta. Prior to the period of time involved in the wage controversy in this case, the existing agreement between the parties called for the payment of flat weekly wages for workweeks of specified lengths, in most cases being $25.00 for 47 hours of weekly employment. No hourly rates were specified and no attempt was made to provide time and one-half for hours worked in excess of forty per week. The new contract drawn in question in the case is an outgrowth of this plan as modified by a War Labor Board.

194. 67 Sup. Ct. 1178 (1947).
determination, and called for a workweek of 54 hours for watchmen, and 46 hours for other regular employees. Weekly wages were set to compensate for the 54 and 46 hour workweeks which were stated to include both payments for regular hours and time and one-half for hours in excess of 40. The formula for calculating the regular hourly rate in the case of employees working more than 40 hours per week as most of them did called for dividing their weekly earnings by the number of hours worked plus one-half the number of hours worked in excess of 40. It was found that in actual practice the formula was not followed literally. The number of hours actually worked was largely disregarded and only the number of hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into the calculation of the so-called regular rate. The result was found to be that the plan in operation made no adequate provision for overtime compensation until employees had worked a total of the 54 or 46 hours in the scheduled workweeks. This was thought to be made additionally clear by the methods employed for calculating the wage of part time employees and those failing to work the whole of their scheduled workweeks, those whose failure was due to “excusable” absences having their wage calculated differently from those whose absences were “not excusable.”

The payment of “overtime” compensation for six hours in the case of workers with “excusable” absences for non-overtime work was thought to raise “strong doubt as to the integrity of the hourly rate upon which the ‘overtime’ compensation is calculated.” The operation of the plan in this respect was said to reveal “further evidence of an attempt to pay a pro-rata share of the weekly wage for an hour’s labor regardless of the number of hours worked up to 46.”

The agreement also called for payment at the rate of one and three-quarters times the formula rate for hours in excess of 46. This was found to come very close to that which would have been received had he been paid an hourly rate determined by dividing the weekly wage payment for the scheduled workweek by 46 with payment of time and one-half for hours worked in excess of 46. And with the exception of the unexcused absence situation, it was found that the operation of the plan for practical purposes was the same as one calling for “employment on a straight time 46 hour

195. Id. at 1182.
196. Ibid.
week with payment of time and one-half only for hours worked in excess of 46.\textsuperscript{197}

The Court concluded that the so-called "'hourly rate' derived from the use of the contract formula was not the 'regular rate' of pay within the meaning of the Fair Labor Standards Act", and distinguished the case from the Belo and Halliburton cases, pointing out that those cases provided for a guaranteed weekly wage with a stipulation of an hourly rate which could properly be regarded as the regular rate. The Court was unanimous in holding that the plan in this case did not satisfy the statutory requirements.

Certainly of more interest at the time of their decision, if not of more practical importance, are the cases dealing with what constitutes work time for purposes of applying statutory requirements as to compensation as involved in the portal-to-portal pay cases.

As early as 1939 the Wage and Hour Administrator ruled that work time for which compensation may be due under the Fair Labor Standards Act may include more than merely that time spent by an employee working for the benefit of the employer for which compensation is customarily paid. Subsequently other rulings indicated that certain waiting time, travel time, or preparatory time should be included in work time.

In March of 1941 the Administrator ruled that travel time underground for miners, exclusive of coal mining, constituted work time. This culminated in the first of the so-called portal-to-portal cases, Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123.\textsuperscript{198}

Before entering upon that discussion, however, mention should be made of two other cases involving waiting time. In the case of Armour & Co. v. Wantock,\textsuperscript{199} previously discussed for a different point, and Skidmore v. Swift and Co.,\textsuperscript{200} both decided the same day in late 1944, involving private firefighting forces in packing plants and soap factories, the Court held that waiting time of these employees subject to call may be treated as work time for purposes of regular and overtime compensation, dependent upon the particular circumstances of each case, and the fact that much of such time may be spent in playing cards and other amusements will not be controlling. Employment in a stand-by capacity in "readiness to serve may be hired quite as much as actual service. . . ."\textsuperscript{201} If the time is spent pre-

\textsuperscript{197} Id. at 1183.
\textsuperscript{198} 321 U. S. 590, 64 Sup. Ct. 698 (1944).
\textsuperscript{199} 323 U. S. 126, 65 Sup. Ct. 165 (1944).
\textsuperscript{200} 323 U. S. 134, 65 Sup. Ct. 161 (1944).
\textsuperscript{201} 323 U. S. 126, 133.
dominantly for the employer's benefit, rather than the employee's benefit that may be the determining factor.

In the first of the strictly portal-to-portal cases, the *Tennessee Coal and Iron* case, travel underground from mine portal to the face of the ore where the actual work is done, found by the trial court to bear "in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employer's benefit, and conditions peculiar to the occupation of mining," was held by Mr. Justice Murphy, speaking for seven members of the Court, to constitute work time within the meaning of the statute. In so holding he emphasized at some length the long "rides in the dark, moist, malodorous shafts from 3000 to 12000 feet" with low ceilings and overhead dangers, where "broken ribs, injured arms and legs, and bloody heads often result (and) even fatalities are not unknown." "The exacting and dangerous conditions in the mine shafts," said Mr. Justice Murphy, "stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb." All of which "compulsory travel occurs entirely on (the employers') property and is at all times under their strict control and supervision." Such "travel time is spent for the benefit of the ... (employers) and their iron ore mining operations. ... Such hazardous travel is thus essential to 'the employers' production." "Iron ore miners travelling underground are ... engaged in a 'process or occupation' necessary to actual production" within the meaning of the statute.

The Court found the contracts for a 54 hour work week "at the usual working place" not controlling, partly on the ground that there had been no bona fide collective bargaining preceding such contracts and partly on the ground that a contract excluding such time like one excluding any other work time would be contrary to the Fair Labor Standards Act.

This latter aspect of the case became the chief point of controversy between the majority and minority of the Supreme Court Justices when they divided 5 to 4 in the second portal-to-portal case, *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America.* There was

203. *Id.* at 596.
204. *Id.* at 598, 599.
205. *Id.* at 599.
involved the bituminous coal mining industry the labor relations in which had been controlled for many years by collective bargaining contracts between the operators and the United Mine Workers, and by which contracts the parties fairly clearly had restricted work time to a "face to face" basis, thus having the effect of excluding any direct allowance for travel time. There was some suggestion that the wage scale provided for by the contracts was intended to compensate indirectly for travel time.

Two issues were involved, (1) whether the travel time properly constituted work time within the meaning of the statute, and (2) whether the contracts involved prevented application of the statute.

As to the first the majority of the Court, again speaking through Mr. Justice Murphy, found "no substantial factual or legal difference between this and the *Tennessee Coal (and Iron)* case and that underground travel in bituminous coal mines as well as in iron ore mines is included within the compensable workweek contemplated by Section 7 (a) of the Fair Labor Standards Act."207

"Factually," said the Court, "underground travel between the portals and working faces of the petitioner's two bituminous coal mines bears all the indicia of work. While the District Court here found 'no such painful and burdensome conditions as those described in the iron ore mines' . . . , all three of the essential elements of work as set forth in the *Tennessee Coal* case are present. . . .

"(1) Physical or mental exertion (whether burdensome or not),"208 involving underground journeys in small empty coal cars varying from one to five miles and fraught with certain hardships, plus 500 to 1500 foot journeys on foot through dark and dangerous tunnels carrying rather heavy equipment.

"(2) Exertion controlled or required by the employer . . . the underground travel is both controlled and required by petitioner [employer]."209

"(3) Exertion pursued necessarily and primarily for the benefit of the employer and his business."210

Thus the first question was fully controlled by the *Tennessee Coal and Iron* case.

As to the second issue the employer rested its case on the conclusion of

207. 325 U. S. 161, 163.
208. *Ibid*.
209. *Id.* at 165.
the district court that "by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time' (53 F. Supp. at 950)."

Quoting from the Tennessee Coal and Iron case, the Court said, "it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." Neither are employees "to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents."

Mr. Justice Murphy's opinion left open the question of "validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time."

Four members of the Court, in an opinion by Mr. Justice Jackson, dissented very vigorously from that part of the majority opinion which denied the efficacy of the contract between the parties to prevent the application of the statute. In thus dissenting the Supreme Court minority most strongly emphasized among other things that the majority ruling "either invalidates or ignores the explicit terms of collectively bargained agreements between these parties based on a half century of custom in the industry," and "(2) Neither invalidation nor disregard of collectively bargained agreements is authorized by the Fair Labor Standards Act. Both its legislative

211. Id. at 166.
212. Id. at 167.
213. Ibid.
214. Id. at 170.
215. Id. at 171.
history and contemporaneous legislation are convincing that Congress did not itself intend to nullify them or to provide any legislative basis for this Court to do so.\textsuperscript{216}

Finally, said Mr. Justice Jackson, "It is hard to see how the long range interests of labor itself are advanced by a holding that there is no mode by which it may bind itself to any specified future conduct, however fairly bargained."\textsuperscript{217}

The third case in this series and the one that has received the most publicity is that of \textit{Anderson v. Mt. Clemens Pottery Co.}\textsuperscript{218}

Space will not permit going into detail on this case, but questions were raised as to both walking time on the employer's premises after punching in on the time clock and certain alleged preliminary activities identified as "putting on aprons and overalls, removing shirts, taping and greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools."\textsuperscript{219}

As to these latter matters the master had denied recovery solely because the amount of time so spent had not been proved by the employees with any degrees of reliability or accuracy. This case is of importance for the handling of this matter by the Court, taking the position that the employee does not keep records, but rather the employer, and hence only the latter is in a position to make accurate proof. The circuit court of appeals had held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled. This, said the Supreme Court, "imposed upon the employees an improper standard of proof"\textsuperscript{220} which would penalize them "by denying him (them) any recovery on the ground that he is (they are) unable to prove the precise extent of uncompensated work."\textsuperscript{221} Unless the employer can provide accurate estimates, it is the duty of the trier of the facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time.

The Court applied the doctrine of the \textit{Tennessee Coal and Iron} and the

\textsuperscript{216} \textit{Id.} at 175.
\textsuperscript{217} \textit{Id.} at 195.
\textsuperscript{218} 328 U. S. 680, 66 Sup. Ct. 1187 (1946).
\textsuperscript{219} 328 U. S. 680, 692, 693.
\textsuperscript{220} \textit{Id.} at 686.
\textsuperscript{221} \textit{Id.} at 687.
Jewell Ridge Coal Co. cases to hold that "time (necessarily) spent in walking to work on the employer's premises after the time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 222 In like manner the same principles were held to apply to time spent in the so-called preliminary activities, and the case was sent back to the lower court for the purpose of determining the amount of time involved in both activities.

In doing this Mr. Justice Murphy emphasized no less than four times that the doctrine of de minimis was not to be overlooked.

Said he, "we do not, of course preclude the application of a de minimis rule where the minimum walking time is such as to be negligible. . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The de minimis rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of the facts makes more definite findings as to the amount of walking time in issue." 223 Also, he said, "it is appropriate to apply a de minimis doctrine so that insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory work week." 224

On that basis, then, the case went back to the district court for Judge Picard to determine whether and how much compensable time was involved.

It was only after the Supreme Court denied a requested rehearing in the Mt. Clemens case, and after the Dow Chemical Company settlement based on the principles of these cases and involving a very substantial monetary sum that a large number of suits were instituted for back pay based on these cases, and that the most acute public interest developed in the matter, with industry urgently demanding that Congress amend the Fair Labor Standards Act to take away the right to recover back pay for such time. If the decision of the district court on its reconsideration of the Mt. Clemens case was to be regarded as indicative of what would happen in a large percentage of those cases, as appeared likely, the much heralded danger to industrial financial stability was more apparent than

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222. Id. at 691, 692.
223. Id. at 692.
224. Id. at 693.
real. It appeared obvious from the outset that many, if not most, of the cases filed would not result in recovery, at least of any substantial amounts, due regard being paid to the de minimis rule.

In applying the de minimis rule to this case and denying that any compensation was due for either walking time or preliminary activities, the district court emphasized that it was walking time bearing no relation to the convenience and necessity of the employee but that "pursued necessarily and primarily for the benefit of the employer and his business" that was held to be compensable by the Supreme Court. Then reasoned the district court, "it is elementary . . . that one on his way to his own lunch in a cafeteria . . . is walking there for his own 'convenience and necessity' and not 'necessarily and primarily for the benefit of the employer and his business'."

In construing the Supreme Court opinion the district court found an intimation that twelve minutes or anything in excess thereof per day should not be considered de minimis, and concluded that clearly everything below 12 minutes should be so considered. Also it interpreted the Supreme Court opinion as restricting walking time to be regarded as compensable to that consumed in going to work and not that involved in returning from work. On that basis it found that the maximum walking time attributable to any employee was not in excess of 6.2 minutes per day, while the so-called preliminary activities were found to occupy less than 3 minutes per day, or a grand total of between 8 and 9 minutes per day, all properly to be disregarded for purposes of compensation under the de minimis rule.

One further observation by the district court is worthy of special notice and that is its holding that if it has misinterpreted the Supreme Court as to what walking time is compensable and walking from as well as to work is to be included, and also to and from lunch, so that it would amount to over 12 minutes and not be de minimis, then, in fairness to the employer here concerned who had followed all wage and hour regulations or rulings available which appeared to indicate that anything less than 20 or 25 minutes could properly be disregarded, only prospective application should be made, and not retroactively so as to cast upon industry an unexpected and unfair burden.

226. Id. at 719.
With the subsequent dismissal of the appeal from the district court's decision by the Sixth Circuit Court of Appeals, on motion of the parties, and a like dismissal on motion of petitioners, attorneys for the Justice Department, of the petition for writ of certiorari in the Supreme Court, this long drawn-out Mt. Clemens litigation reached its final termination. The later enactment of the Portal-to-Pay Act of 1947 brought an end, temporarily at least, to the interest in this whole problem involved in the many portal-to-portal pay suits. That this Act also made other far-reaching changes in the Fair Labor Standards Act of 1938 is a matter not appropriate for the present discussion.