

### Labor--National Labor Relations Board--Employer and Employee Relationship (National Labor Relations Board v. Carlisle Lumber Co., 94 F.2d 137 (9th Cir. 1937))

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threaten to strike, or enter into contract, for a "closed shop", even to the extent of monopolizing the whole industry or community.<sup>18</sup> It will be noticed that the purpose and the methods still have to be lawful, although the courts have become very liberal in this respect.<sup>19</sup> The anti-injunction acts have made it almost impossible to obtain an injunction in labor disputes;<sup>20</sup> however, the unions are still liable in damages for violence and other unlawful acts.<sup>21</sup> The right of an employer to hire and fire has not as yet been taken from him, though qualified almost to the point of extinction.<sup>22</sup> The language of some cases is dangerously broad,<sup>23</sup> but labor has not been permitted to abuse its power of monopoly too much.<sup>24</sup>

R. B. F. G.

LABOR—NATIONAL LABOR RELATIONS BOARD—EMPLOYER AND EMPLOYEE RELATIONSHIP.—Defendant was charged with unfair labor practices. Defendant lumber company's logging and milling operations are carried on entirely within the State of Washington, nine-tenths of its output, however, being shipped in interstate commerce. In 1933 a company union was formed. In 1934 a group of defendant's employees formed a union affiliated with the American Federation of Labor. In an election under the National Industrial Recovery Act<sup>1</sup> the latter union was selected as the sole bargaining representative of the employees. A strike was called in May, 1935. Prior to the National Labor Relations Act becoming effective,<sup>2</sup> defendant discharged all employees on strike. Company then reemployed those employees who renounced all affiliations with any labor organi-

<sup>18</sup> See note 15, *supra*.

<sup>19</sup> See note 8, *supra*.

<sup>20</sup> NORRIS-LAGUARDIA ACT, 47 STAT. 70 (1932), 29 U. S. C. §§ 101-115 (1932); *New Negro Alliance v. Sanitary Grocery Co.*, — U. S. —, 58 Sup. Ct. 703 (1938); see (1938) 13 ST. JOHN'S L. REV. 171; N. Y. CIV. PRAC. ACT § 876-a (and annotated cases); see (1938) 12 ST. JOHN'S L. REV. 358.

<sup>21</sup> See Ed. N. Y. L. J., May 28, 1938.

<sup>22</sup> *Sherman v. Abeles*, 265 N. Y. 383, 193 N. E. 241 (1934); *O'Keefe v. Local 463*, 277 N. Y. 300, 14 N. E. (2d) 77 (1938).

<sup>23</sup> See *American Fur Mfrs. v. American Fur Coat*, 161 Misc. 246, 252, 291 N. Y. Supp. 610, 617 (1936).

<sup>24</sup> *Brescia Const. Co. v. Stone Masons Ass'n*, 195 App. Div. 647, 187 N. Y. Supp. 77 (1st Dept. 1921); *Falciglia v. Gallagher*, 164 Misc. 838, 299 N. Y. Supp. 890 (1937). In these cases, the union was acting as a tool in the hands of a monopolistic employers' association.

<sup>1</sup> 48 STAT. 195 (1933), 15 U. S. C. § 702 (1934).

<sup>2</sup> 49 STAT. 449, 29 U. S. C. A. §§ 151-166 (Supp. 1935). The constitutionality of the Act was upheld in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937).

zations. A company union was formed which the defendant dominated and financially supported. The Board charged that these acts were unfair labor practices<sup>3</sup> and ordered (1) the rehiring of striking employees with back pay, (2) the company to bargain collectively with the union, and (3) the withdrawal of all recognition from the company union. On appeal of defendant from the order of the Board, *held*, affirmed. *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th, 1937).

The company contends that the Act is not applicable inasmuch as (1) it was not engaged in interstate commerce, (2) that at date of effectiveness of Act the relation of employer and employee had been terminated. That the commodity might eventually be shipped in interstate commerce is not sufficient reason to consider the entire business as such.<sup>4</sup> The court relying upon the later decisions of the Supreme Court<sup>5</sup> held that if the practices are likely to "obstruct, restrain, or burden" the shipment of commodities in interstate commerce, Congress may subject them to federal supervision and control. That there is a distinct tendency towards this latter construction is apparent.<sup>6</sup> Inasmuch as the doctrine of the *Carter Coal Co.* case, upholding defendant's contention, is inconsistent with the more recent decisions of the Supreme Court,<sup>7</sup> it must be disregarded. Here the obstruction of the defendant's operations by unfair labor practices prevented his product from entering interstate commerce and as such, was within

<sup>3</sup> 49 STAT. 499, 29 U. S. C. A. § 158 (Supp. 1935) provides: "It shall be an unfair labor practice for an employer:

1. To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title.

2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it \* \* \*.

3. By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discharge membership in any labor organization \* \* \*.

5. To refuse to bargain collectively with the representatives of the employees \* \* \*."

<sup>4</sup> *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475 (1886); *Heisler v. Thomas Colliering Co.*, 260 U. S. 245, 43 Sup. Ct. 883 (1922); *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855 (1935).

<sup>5</sup> *United Mine Workers v. Coronado Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (1922); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 Sup. Ct. 551 (1925) (where the Court found sufficient evidence to show such obstruction); *N. L. R. B. v. Jones & Loughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937); *cf. Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855 (1935).

<sup>6</sup> See *N. L. R. B. v. Jones & Loughlin Steel Corp.*, 301 U. S. 1, 31, 32, 57 Sup. Ct. 615, 621, 622 (1937). The court said, "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce or its free flow are within the reach of Congressional power \* \* \*. It is the effect upon commerce, not the source of the injury, which is the criterion."

<sup>7</sup> *N. L. R. B. v. Jones & Loughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937); *Edwards v. United States*, 91 F. (2d) 767 (C. C. A. 9th, 1937); *N. L. R. B. v. Santa Cruz Fruit Packing Co.*, 91 F. (2d) 790 (C. C. A. 9th, 1937), *aff'd*, 58 Sup. Ct. 656, 302 U. S. 680 (1938).

the scope of the Act.<sup>8</sup> The discharge of the strikers does not terminate the relationship of employer and employee, for under the Act a striking employee does not lose the identification of employee.<sup>9</sup> This relationship between the company and the striking employees has not been so completely terminated as to have no further connection with the company's business or the commerce in which it is engaged.<sup>10</sup> The mere fact that the labor dispute<sup>11</sup> had commenced prior to the passage of the Act does not withdraw the parties or the dispute from the regulatory power of Congress as to the acts subsequently occurring.<sup>12</sup> This is not unconstitutional as a denial of due process of law because of refusal to employers of the right to hire and discharge employees at will.<sup>13</sup> It is clear that the restriction on the employer's rights, which is contained in the Statute, although curtailing his unrestricted use of the right to hire and fire, is directed merely at its abuse for the purpose of interfering with union activities.<sup>14</sup>

J. J. S.

LABOR — NORRIS-LAGUARDIA ACT — FEDERAL JURISDICTION — APPLICATION OF THE ACT.—The defendant corporation operating stores in the District of Columbia employs both white and colored persons. The petitioner, a corporation composed of colored persons, in an effort to force the defendant to adopt a policy of employing negro clerks in certain of its stores caused a member of the alliance to picket one of the defendant's stores. There existed no employer-employee

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<sup>8</sup> 49 STAT. 499, 29 U. S. C. A. § 152 (7) (Supp. 1935): "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

<sup>9</sup> 49 STAT. 499, 29 U. S. C. A. § 152 (3) (Supp. 1935): "The term 'employee' \* \* \* shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

<sup>10</sup> Jeffrey-DeWitt Insulator Co. v. N. L. R. B., 302 U. S. 731, 58 Sup. Ct. 55 (1937).

<sup>11</sup> 49 STAT. 499, 29 U. S. C. A. § 152 (9) (Supp. 1935): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee."

<sup>12</sup> The court was of the opinion that the act defined its retroactive intention, but in rendering its decision confined itself to acts committed by the defendant subsequent to the effectiveness of the act. Instant case at 145.

<sup>13</sup> N. L. R. B. v. Washington, Virginia & Maryland Coach Co., 85 F. (2d) 990 (C. C. A. 4th, 1936), cert. granted, 299 U. S. 533, 57 Sup. Ct. 112 (1936), *aff'd*, 301 U. S. 142, 57 Sup. Ct. 648 (1937).

<sup>14</sup> Legis. (1935) 35 COL. L. REV. 1098, 1123.