

Constitutional Law—Direct and Indirect Effect Upon Commerce— Due Process (National Labor Relations Board v. Jones Laughlin Steel Corp., 57 S. Ct. 619 (1937))

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In the absence of special contract, the extent of damages is the difference between the market value of the shipment at destination in the condition in which tendered to the consignee and the condition in which it was delivered to the carrier, the damaged portions being disposed of in accordance with the usage and custom of the trade.⁷ Consignee must accept the damaged goods and take all reasonable steps to minimize damages, unless the shipment is so damaged as to be valueless. Consignee-plaintiff is then entitled to be put in as good a position as he would have been had the defendant carrier delivered the shipment uninjured, regard being had in applying the measure of damages to the use and the purpose for which the shipment was intended.⁸

In the instant case, the plaintiff having met both the requirements of "condition" and "damages", the judgment was correctly rendered.

W. D. D.

CONSTITUTIONAL LAW—DIRECT AND INDIRECT EFFECT UPON COMMERCE—DUE PROCESS.—Respondent corporation is one of the largest manufacturers of steel in America. It receives most of its raw materials from, and ships seventy-five per cent of its products to states other than Pennsylvania in which it has its principal mills. It employs more than a half million men. Respondent discharged nine men, allegedly for engaging in union activities. All of the discharged men were engaged in manufacturing in the respondent's Pennsylvania mills. The discharged men appealed to the National Labor Relations Board which found the respondent had violated the National Labor Relations Act¹ by engaging in unfair labor practices affecting commerce. The Board ordered the respondent to offer reinstatement to the discharged men and to make good their losses in pay. Upon failure of the corporation to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The Court denied the petition holding the Act unconstitutional in so far as it affects manufacturing or

⁷ 10 CORPUS JURIS 395, § 606; *Chicago, M. & St. P. R. R. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 40 Sup. Ct. 504 (1920); *Kilthau v. International Mercantile Marine Co.*, 245 N. Y. 361, 157 N. E. 267 (1927); *King v. Sherwood*, 22 App. Div. 548, 48 N. Y. Supp. 34 (2d Dept. 1897); *Porter v. Penna. R. R.*, 217 App. Div. 49, 215 N. Y. Supp. 727 (7th Dept. 1926); *Perkel v. Penna. R. R.*, 148 Misc. 284, 265 N. Y. Supp. 597 (1933); *Crinella v. Northwestern Pac. R. R.*, 85 Cal. App. 440, 259 Pac. 774 (1927).

⁸ *Perkel v. Penna. R. R.*, 148 Misc. 284, 265 N. Y. Supp. 597 (1933).

¹ Act of July 5, 1935, 49 STAT. at L. 449, c. 372, 29 U. S. C. A. § 151 (1935); (1936) 10 ST. JOHN'S L. REV. 359 (discussion of provisions of bill). Labor is guaranteed the right to organize, and employers are forbidden to interfere with labor's rights. Such interference is termed an unfair labor practice.

any other intrastate business.² On appeal to the Supreme Court, *held*, reversed. The Act is valid in its entirety; Congress may regulate intrastate practices which directly burden commerce; and labor relations may be one of these practices. *National Labor Relations Board v. Jones Laughlin Steel Corp.*, 300 U. S. —, 57 Sup. Ct. 619 (1937).

The Wagner Act declares that interference by employers with labor's right to organize, causes strikes which seriously affect interstate commerce. Such interference therefore becomes the proper province of Congress.³ Legislation enacted under the commerce clause must conform to due process.⁴ An act is lacking in due process when it is unreasonable or arbitrary,⁵ or when considered as a means, the measure has no real or substantial relation of cause to a permissible end.⁶ The court's finding that the Act is not lacking in due process and that freedom of contract is not infringed,⁷ shows a direct reversal from the attitude of the court in *Adair v. U. S.*,⁸ which case decided that a law which forbids an employer from discharging any employee because of membership in a union is violative of the Fifth Amendment.

There is much in the preamble of the Act and in congressional discussions on the bill to give rise to an inference that Congress had as a primary concern, not regulation of commerce but, control of labor-

² 83 F. (2d) 998 (C. C. A. 5th, 1936).

³ U. S. CONST. Art. I, § 8, par. 3: "Congress shall have power to regulate commerce * * * among the various states * * *." The power to regulate commerce is the power to restrain, foster, protect and control.

⁴ U. S. CONST. Art. V: " * * * nor (shall any person) be deprived of life, liberty or property without due process of law." Liberty includes freedom of action. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* (1922) § 234; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 55 Sup. Ct. 854 (1935).

⁵ *Interstate C. C. v. P. R. R.*, 222 U. S. 541, 32 Sup. Ct. 108 (1912). JACOBSON, *DEVELOPMENT OF POLITICAL THOUGHT*, p. 539.

⁶ The courts have long recognized the right of labor to organize. *American Steel v. Tri City*, 257 U. S. 184, 42 Sup. Ct. 72 (1921). Legislation which restates the rights of labor and compels employers to recognize those rights cannot be termed arbitrary or unreasonable. The measure seeks to remove strikes from obstructing commerce by removing the cause of strikes; the intimate relation of cause to the end is likewise present.

⁷ Any legislation which compels an employer to negotiate with one with whom he would not otherwise deal, *does* infringe upon the employer's freedom of contract (as developed in the *Adair* case). Here was an opportunity for the Court, with the case of the *West Coast Hotel* fresh in mind, to say that there was here an infringement upon individual liberty but "the constitution does not recognize an absolute and uncontrolable liberty. The liberty safeguarded being liberty in a social organization which requires the protection of laws against the evils which menace the health, safety, morals, and welfare of the people." The Court, however, in some manner arrived at the conclusion that "a provision that employers must treat with labor's representatives does not abridge freedom of contract * * *."

⁸ 208 U. S. 161, 28 Sup. Ct. 277 (1908).

relations;⁹ but a consideration of the effective provisions of the bill shows nothing but the desire of Congress to remove an obstacle to the free flow of commerce.¹⁰ Where the Act upon its face is what it purports to be the court is "not at liberty to inquire into the motives of the legislature."¹¹

The court rests its decision that the Act is constitutional upon the settled rule that Congress may regulate practices which, although local in character, directly burden or hinder interstate commerce.¹² It is submitted, that the finding that *labor relations* of an *intrastate* employer can *directly* affect commerce will set at naught the dicta¹³ of the *Schechter* case¹⁴ and that part of the *Carter* decision¹⁵ which attempted to set up as the test of federal control of local practice—not whether commerce is affected *unduly*¹⁶ but rather whether commerce is affected *proximately*.¹⁷ The court in the instant case defi-

⁹ U. S. CONST. Art. X: "The Powers not delegated to the Federal Government by the Constitution nor prohibited by it to the states are reserved to the states respectively * * *"

¹⁰ "The grant of authority * * * does not purport to extend to the relationship between all industrial employees and employers. It purports to reach only what may be deemed to burden or obstruct that commerce * * *". Instant case, p. 621.

¹¹ *Ex parte McCordle*, 7 Wall. 506 (U. S. 1868); WILLOUGHBY, ON THE CONSTITUTION (2d ed. 1929) § 20.

¹² *Chicago Board v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923); *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1922).

¹³ The case had already been disposed of by the holding that the N.I.R.A. represented an unauthorized delegation of legislative power. Corwin, *The Schechter Case—Landmark, or What?* (1936) 13 N. Y. U. L. Q. R. 155, 162.

¹⁴ *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935); 10 ST. JOHN'S L. REV. 119 (discussion); Corwin, *The Schechter Case—Landmark, or What?* (1936) 13 N. Y. U. L. Q. R. 155.

¹⁵ *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855 (1936); (1936) 11 ST. JOHN'S L. REV. 107.

¹⁶ The *effect* upon commerce was the test prior to the *Schechter* and *Carter* cases. *Chicago Board v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923); "What the cases mean (when they use the word direct) is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair over-excessive strain." Dissenting opinion, *Carter v. Carter*, 298 U. S. 238, 56 Sup. Ct. 855, 880 (1936). In other words the local practice need not proximately affect interstate commerce. It was enough to bring it under federal control that the practice, even though through some intermediary to which it gave existence, *burdened* commerce. It is the effect upon commerce, not the source of the injury which is the criterion; *Texas R. R. v. Brotherhood*, 281 U. S. 548, 570, 50 Sup. Ct. 427 (1929); Corwin, *The Schechter Case—Landmark, or What?* (1936) 13 N. Y. U. L. Q. R. 168; BRANT, *STORM OVER THE CONSTITUTION* (1936) 144.

¹⁷ The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. *And the extent of the effect bears no logical relation to its character.* The distinction between direct and indirect effect turns, not upon the magnitude of either the cause or effect, but entirely upon the manner in which the effect has been brought about. Instant case, p. 638, dissenting opinion quoting *Carter* case.

nitely refuses to concern itself with *proximity* of cause. It says, "The question remains as to *the effect upon interstate commerce of the labor practices* involved; * * * the fact remains that the stoppage of those (respondents) operations by industrial strife would *have a most serious effect* upon interstate commerce. In view of respondents' far flung activities, it is idle to say the effect would be indirect or remote."¹⁸

B. B.

CONTRACTS — CONSIDERATION—"BANK NIGHTS"—PROMISSORY ESTOPPEL.—The defendant, in course of operating its theatre, held what is commonly termed a "Bank Night".¹ Patrons of the theatre, among whom was the plaintiff, were requested to enter their names and addresses next to numbers in a book provided by the defendant, who advertised publicly that the person whose number was drawn on a certain night would be awarded a money prize. Plaintiff alleges that he has done all the defendant had requested, that he was present when his number was drawn, and that the defendant has refused payment of the prize money. Defendant moves to dismiss the complaint for failure to state a cause of action on two grounds: (1) Lack of consideration for promise to pay prize money; (2) the contract, if the court finds consideration, is illegal and void as a lottery. *Held*, motion to dismiss complaint denied. The plaintiff furnished adequate consideration and according to a decision affirmed by the Court of Appeals certain "Bank Night" schemes are not lotteries,² and, therefore, are legal.³ *Simmons v. Randforce Amusement Corp.*, 162 Misc. 491, 293 N. Y. Supp. 745 (1937).

Consideration need not be tangible property capable of delivery, nor need it have monetary value,⁴ but it may consist in the promisee's performance of something he was not already legally bound to do.⁵ The plaintiff furnished adequate consideration for the defendant's

¹⁸ The Court seems to avoid the use of the word "direct" or "indirect"; it speaks of "the close and intimate effect," p. 625, "the close and intimate relation," p. 624.

¹ (1937) 37 COL. L. REV. 877.

² N. Y. PENAL LAW § 1370: "A lottery is a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift, enterprise or some other name".

³ *People v. Shafer*, 160 Misc. 174, 289 N. Y. Supp. 694, *aff'd*, 273 N. Y. 475, 6 N. E. (2d) 410 (1936).

⁴ ANSON, CONTRACTS (Turck ed. 1929) 63.

⁵ 13 CORPUS JURIS 324; POLLOCK, CONTRACTS (4th ed. 1888) 166; 1 WILLISTON, CONTRACTS (1st ed. 1934) § 102a; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49; *Carlill v. Carbolic Smoke Ball Co.*, 1 Q. B. 256 (1893).