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ARGUMENTS

IN THE CASES ARISING UNDER

THE RAILWAY LABOR ACT

AND

THE NATIONAL LABOR RELATIONS ACT

BEFORE THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY 8–11, 1937

THE VIRGINIAN RAILWAY CO. v. SYSTEM FEDERATION NO. 40

THE ASSOCIATED PRESS v. NATIONAL LABOR RELATIONS BOARD

WASHINGTON, VIRGINIA AND MARYLAND COACH CO. v. NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.

NATIONAL LABOR RELATIONS BOARD v. FRUEHAUF TRAILER CO.

NATIONAL LABOR RELATIONS BOARD v. FRIEDMAN-HARRY MARKS CLOTHING CO., INC.

PRESENTED BY MR. WAGNER

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CONTENTS

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY, PETITIONER

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL., RESPONDENTS

ORAL ARGUMENT

WASHINGTON, D. C.
Monday, February 8, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 2:30 p. m.

Appearances:

On behalf of the petitioner: Mr. James Piper and Mr. H. T. Hall.

On behalf of the respondents: Mr. Frank L. Mulholland.

On behalf of the United States as amicus curiae: Hon. Stanley F. Reed, Solicitor General of the United States.

The CHIEF JUSTICE. No. 324, The Virginian Railway Company against System Federation No. 40, Railway Employees Department of the American Federation of Labor, and others. Mr. Piper.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. PIPER. If the Court please, this is a case which was originally instituted in the District Court of the United States for the Eastern District of Virginia. A decree was entered in that court requiring the defendant railway to recognize and treat with the System Federation No. 40, Railway Employees Department, as a representative of the employees in six crafts, constituting the mechanical department of the Virginian Railway. The decree also provided that the railway should not, in connection with contracts relating to rules, rates of pay, and wages, deal with anyone else than the federation. The decree also provided for a restraining order restraining the railway from influencing, coercing, or interfering with the free choice of the employees in the selection of their representatives. The facts are short, and I will try to briefly summarize them.

In 1920, when the railways were turned back from the Government to the owners, the Transportation Act was passed. Subsequently,

on July 1, 1922, there was a national strike involving shopmen on all the roads in the United States. On July 3, 1922, the United States Railway Labor Board, which had been created by the Transportation Act of 1920, sent out a request to all the carriers and their employees requesting the employees to organize for collective bargaining. That request was posted on the bulletin board of the petitioner, the Virginian Railway, and in response to that request there was formed a Virginian Employees Association, which we will call "the association"—it had a much longer term—and which functioned by entering into an agreement between the employees and the railway relating to rates of pay, rules, and working conditions. This agreement, while not included in the record originally, is in the record now at the request of the respondent.

The Court will see that it is a very full, elaborate agreement, consisting of 112 rules, outlining working conditions, rates of pay, and other matters relating to the position of the employees of the Virginian on that road.

I might say that before the January 1, 1922, strike the Virginian road was a union road; that is to say, it was organized and there was a union on there, an affiliate of the A. F. of L. After the strike the record shows that the strike was not a success and a great many, if not all, of the union men were replaced by other men and the road carried forward.

At this point it seems to me it has a quite important bearing to understand what is meant by the mechanical department employees of this particular road. The mechanical department employees are divided into two classes. One class of mechanical department employees does running repair work, that is to say, work on cars and engines to keep the traffic moving. The other class of mechanical department employees does backshop work.

The strike of '22 was declared a shopmen's strike, but the shopmen in turn are divided into running repairmen, who are scattered over the line of this road from its West Virginia terminus to its Virginia seacoast terminus, with groups of running repairmen at different points; the back-shop employees, on the other hand, are located in Princeton, which is not a division point, and they work in a shop. Their work embraces so-called classified repairs and store-order work. Classified repairs, in the understanding of the business, mean heavy repairs to locomotives and to cars, where the locomotives and cars are taken out of service, as the record will show, for 105 days for one and 109 days for the other. They are cars or locomotives which have ceased to be instrumentalities of interstate commerce and are taken to a shop for major repairs, which occupy on the average over 3 months, and are then returned to service.

Now the other work done by the back-shop employees consists of so-called store-order work, which means the making of parts, such as nuts and bolts and things of that kind, which are sent out to the various points on the road for use. The record will show that as to those articles made in the back shop, if the railway can make them more cheaply than it can buy them, they make them in the back shop. Otherwise, if they can buy them more cheaply than they can make them, they are bought on the market.

The relations of the Virginian Railway with its employees, under this agreement of November 15, 1922, the record shows, were entirely

satisfactory and harmonious during a period of 12 years. In the fall of 1933 the American Federation of Labor, the record shows, sent paid organizers on the property and attempted to organize the road. While that was in progress, I mention in passing because the matter becomes important later, the railroad posted a bulletin on its various bulletin boards advising the men, in answer to inquiry, that so-called company unions, such as this association, were not barred by the act of 1926, the Railway Labor Act, but were permitted. The organization of this road continued and the Mediation Board services were invoked by the American Federation of Labor on July 5, 1934. At that time a mediator came to the property and checked authorizations handed him by the American Federation of Labor against the eligible lists of employees in these six classes. This is important. The mediator did not find a majority in favor of the American Federation on that check, and therefore refused to certify at that moment, July 5, that the American Federation had been chosen.

About that time Mr. Sasser of the railroad distributed amongst employees a statement. This statement plays a great part in the decision and opinions of the case. It is referred to continually, and properly, as the so-called Sasser statement. That statement undertook to set out the facts in connection with this labor dispute which I am now discussing. It undertook to show, first, the strike and difficulties under the previous arrangement, followed by the peace and satisfaction under the company agreement with the association, and then stated as further facts the advantages, in Sasser's and the company's opinion, of company, that is to say, representation, by employees in an association, rather than representations by outsiders representing employees.

Following that statement the Federation made another request for mediation, and the Mediation Board sent another mediator to the property, and he undertook to conduct an election. That election was to be conducted under the rule that a majority of the eligibles were necessary to elect in any class. It did not go forward one day, when a new rule was adopted, and a new election was started.

The new rule provided that not a majority of the eligibles should elect, but a majority of those voting at the election should elect.

As a result of that election, the Mediation Board on September 13, 1934, issued its certificate stating that the federation was the duly accredited representative of the six classes covered by the certification. The certificate, we argue later, is of no effect on its face, because it does not show how many eligibles were in each class but merely shows the vote. The court held its rule was that if a majority voted, then that majority voting could elect the representative, but if less than the majority participated, there was no election. That applied to one class, the carmen and coachmen. Less than a majority of the carmen and coachmen voted at this election, and therefore the court ruled that as to that class there was no election. In the case of the blacksmiths, more than a majority of the eligibles voted but less than the majority of the whole voted for the federation, but the court held, the lower court, affirmed by the court of appeals, held, that in that case the federation was elected.

Now after the election there was formed on the railroad an [illegible] pendent shop crafts association. I just say in passing that the [illegible] court—we think it was clear error—decided that the association [illegible]

formed at the instance of and was dominated by the railroad. There is not a scintilla of proof in the record that the railroad had anything to do with the formation of that association. In fact, all the proof is to the contrary. The same thing may be said of the association which was formed in 1922. That has been referred to in the briefs and opinions as a figurehead, a dummy corporation, controlled by the railroad. We say that it is clear error; that there is no evidence of any kind that that is a fact, but in fact the evidence, even of the federation's own witnesses, showed that that association functioned without any interference or domination from the railway.

As I said, the suit was instituted on May 2, 1935, resulting in this decree which I have briefly outlined.

The first point which comes up for consideration by this Court in connection with this appeal is whether or not section 2, ninth, of the Railway Labor Act requires us, that is, the railway, to meet in conference with the representatives of the federation. The federation claims that we would not meet them in conference. The record shows that on December 27 they met certain officers of the railway and delivered to them a form of agreement which had for its object the substitution of the federation under the existing agreement for the association, and which also undertook to include certain other mechanical-department employees which were not included in the six crafts in connection with which the election had been held.

That agreement is interesting because it shows on its face—it is on page 31 of the record—that there was to be no change in rates of pay or working conditions; that the main purpose of the agreement was to substitute the name of the federation in the caption in place of the association; but in other respects the agreement was to continue.

Nothing resulted apparently; the record is silent, anyway, as to what happened after that meeting and after presenting that agreement. We must assume that the parties did not come together, because 5 months later this suit was instituted.

Now we come back to section 2, ninth, of the Railway Labor Act.

Justice BRANDEIS. May I trouble you to state again what the issues are in this case?

Mr. PIPER. Yes. The issues are stated on pages 2 and 3 of our brief, and I think the quickest way to answer Your Honor's question would be to read those carefully. I was going to take them up one by one, but I will read them all.

The first question is whether section 2, ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class—in this case the federation—imposes a legally enforceable obligation upon the carrier to negotiate with the representative so certified. We are arguing, Your Honor, that "treat with as" should be regarded as "recognize." The other side, the respondent, and the Government to some extent, argue that "treat with as" means we must meet them in conference and negotiate. Now, that is the first point.

The second point is whether, if section 2, ninth, of the Railway Labor Act requires the railway to negotiate with the federation, it is unconstitutional, in that it deprives the railway of its liberty and property in violation of the due process clause of the fifth amendment

of the Constitution of the United States. We are arguing that the construction given by the lower court and affirmed by the circuit court of appeals—that construction, not the act as we construe it, but that construction—violates our liberty of contract.

The third point we make in our brief is whether the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce. That point is under the *Employers' Liability Case* (207 U. S. 463). We are there arguing that these back-shop employees are not themselves engaged in interstate activity, and their actions have no direct bearing on interstate activity; that this act makes no attempt to distinguish between matters over which Congress had authority and over intrastate commerce, and therefore, under the decisions of this Court, the act as a whole is unconstitutional.

Our next point relates to the certificate of the Mediation Board, as to whether or not that was a proper certificate. We say it was improper, because the election was held under a wrong rule. We also say that the finding of the lower court, the C. C. A., that a majority of a majority of eligibles should elect, is in error. Our contention is that the act means a majority of the eligibles,and not a majority of a majority.

We further say that it is impossible to tell from the certificate the number of employees who could have voted or whether they were back-shop employees over which we think Congress had no authority to act or whether or not they were running repairmen.

The next point, and last point in the brief, relates to the construction of the Norris-LaGuardia Anti-injunction Act (c. 90, 47 Stat. 70; U. S. C., title 29, secs. 101, et seq.) in connection with the relief given under this case. We claim that the decree of the lower court is not permissible in view of the limitations placed on the jurisdiction of equity courts to grant injunctions in labor disputes. There are several reasons in that connection. I think perhaps it would be better to state the reasons for that objection.

Now that covers the scope of the basis of our appeal.

Justice BRANDEIS. Dealing all with questions of law?

Mr. PIPER. Dealing all with questions of law, Your Honor, except insofar as, for instance, this back-shop work and running repair work, it is necessary to show from the record the kind of work these men did. I do not think there is much question of dispute of the law there. That is a question of the application to the facts.

Justice BRANDEIS. It is a question of the interpretation of conflicting evidence?

Mr. PIPER. That is right.

Then the next question is related to the other questions of fact to a certain extent that are involved. When we get to the question of the Norris-LaGuardia Act we have got to show by the facts of the record on what basis or what facts the lower court based its decree, and then show that those facts are protected by the Norris-LaGuardia Act and should not have been the basis of the relief granted.

I have finished the points now. I feel at this moment I have covered them sufficiently to satisfy Your Honor.

In order to determine what section 2, ninth, means—I was just about to read it—it will be necessary to give a short history of the

railway labor legislation commencing with the Transportation Act, in order to find the basic purpose of the act which is now under review.

Section 2, ninth, which is the section we are now considering, was added to the act of 1926 by an amendment of June 1934, which reads:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirement of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

Now it is the next sentence that is the important one—

> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.

That section, as I say, was added to the act of 1926. In 1920 the Transportation Act, the section on which this whole section 2 in the present act was based, was section 301. That says briefly—I will skip it—

> It shall be the duty of all carriers, and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation—

and so forth.

> All such disputes shall be considered and, if possible, decided in conference between—

and so forth.

> the respective employees and the carriers,

That was the inception, pointed out in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548), of this labor legislation. It was followed by the act of 1926, which did not change the scope or plan of the original act, but gave in more detail the mechanics for carrying out the provisions of the Transportation Act which experience had shown were necessary in order to make the law effective.

We have a very full discussion of the effect and purpose of the 1926 amendments in the *Texas & New Orleans case*. In that case the employees were objecting to interference, influence, and coercion by the employer, and this Court held that, while the *Pennsylvania cases* (*Pennsylvania R. R. Co.* v. *Railway Labor Board* (261 U. S. 72), *Pennsylvania Federation No. 90* v. *Pennsylvania R. R. Co.* (267 U. S. 203)), which had held under the Transportation Act the use of the language "It shall be the duty" did not create a legally enforceable obligation—in other words, it was an imperfect obligation—nevertheless, in order to keep the voluntary scheme of the act, which His Honor, Chief Justice Hughes, said was its essence, it was necessary to keep that freedom; that interference by the employer with the self-organization of the employee must be preserved and could be preserved by decree in equity. Of course, we have no dispute with that decision, and we think that that decision, taken in connection with the history of the act, supports our present contention that no compulsion was required by the Transportation Act of 1920; that no compulsion under the two *Pennsylvania cases* and the *Texas case* was required by the 1926 act, and that the congressional plan, the plan of the act, has remained

the same, and that no compulsion is now required under the terms of this act which enables a court of equity to force an unwilling employer, or employee, for that matter, or representative of an employee, into a conference and negotiations. We think it is perfectly clear from the history of the act and from the cases, that it is only intended and should be read that "treat with as" means "recognized."

We admit that if we proceeded under the act to change the rules, rates of pay, or working conditions, and wanted to treat with the employees, we would necessarily, if the act is otherwise constitutional and an employee representative had been duly certified, treat under section 6 of the act with the representative so chosen; but we deny the act was intended to mean that we would be forced to a conference leading to a negotiation leading to a contract.

We think that is fairly well illustrated by the fact—that is to say, we think that what Congress intended is illustrated by the fact—that neither the Government nor the respondent argues that this drastic right, which is drastic in view of the former statutes, comes into effect unless there is dispute amonst the employees. In other words, if the employees voluntarily and unanimously chose their own representative, the right to a compulsory negotiation does not exist under the act. The act only applies, as the Government and the respondent admit, in case there is a dispute. Your Honors can readily see that that might easily lead to a fake dispute in order to get the Mediation Board to act, in order to have a representative certified by ballot, in order to carry with it the right to be enforced by equity to a negotiation.

Now, to us it seems impossible that Congress could have intended to pass any act embracing such an anomalous situation. Why should this right, which was denied in the Transportation Act as an enforceable obligation and in the act of 1928 as an enforceable obligation—why should this right only come into being in case of a dispute amongst employees and a certification? To me that interpretation just does not make sense. It does not seem reasonable or possible.

We are further driven to the conclusion that the act was not intended to create an enforceable obligation by looking at the other sections in the act, which we have a right to do, as I take it, in construing this section.

The act of 1934 carried forward the old act with certain amendments, modifications, and additions. Section 2, General Purposes—by the way, it is a very excellent arrangement of this act found in the Government's brief. Page 108 of the Government's brief gives the act of 1926 and shows interlineations and the changes brought into the act of 1934.

The first and second paragraphs of section 2 were brought forward from the old act of 1926 practically in substance; the third modified but substantially the same; the fourth was modified but to a certain extent new; the fifth new; the sixth was the same substantially as the old fourth; the seventh new, and so forth. The ninth was a new paragraph added. There was also added to the act—and this is significant—a tenth paragraph, which provided a penalty clause in case the terms of the act were not complied with; and it is also significant that this penalty clause, which provided that refusal to comply with the terms of the act shall be a misdemeanor subject to fine and imprisonment, was made to apply to certain paragraphs of the

amended act, to wit, third, fourth, fifth, seventh, and eighth paragraphs of section 2. You will note in applying that penalty clause that it does not apply to the first and second, which are carried forward from the old act, it does not apply to 2 or 6, which were substantially carried forward from the old act, but it does apply to all the sections which are carried forward, though modified, from the old act, which have for their effect the recognition of collective bargaining and the right of employees to choose their representative without influence, interference, or coercion.

The main effect of the penalty clause, together with the provision commonly called the "yellow dog" provision, which was inserted in this act as an addition—the main purposes, therefore, of the penalty clause, it seems, were to implement or fortify the sections relating to collective bargaining and freedom from interference. It is not controlling, but very significant, that the penalty clause is not made to apply to 2, ninth. I say it is significant, because it is also not made to apply to section 6 of the act, which is the section which relates to the procedure for changing agreements relating to rules, working conditions, and rates of pay.

As we read the act, section 6, which contemplates a conference, does not require a conference, and we also argue, as we read the act, that section 26, which also contemplates a conference, does not require a conference, and the penalty clause does not attach to any section in the act where apparently a conference is contemplated.

Now if we read that in connection with section 5 of the act, which was very different from the section of the old act, you will find the force of this point. Section 5 of the act provides that the parties or either party to the dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference;
(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

We believe that Congress, in changing that section 5, must have been aware of the fact that, under the decisions of this Court in the *Pennsylvania cases* and the *Texas case*, conferences should be refused, and they there set up a procedure to be followed when a conference was refused, specifically. Where conferences are refused the procedure set up is what? Either party may invoke the services of the Mediation Board or may tender its own services. The Mediation Board then is to bring the parties, if possible, into agreement. Failing that, its last final action is to try to attempt to get the parties to an arbitration agreement. The interesting part of that is that the act specifically provides in section 7 that the refusal to arbitrate cannot be considered a breach of the act. I will read that in just a minute.

That is headed "Arbitration." It is the first section, the last paragraph, that I am reading, where a controversy arises and an arbitration is suggested. It says [reading]:

Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this act or otherwise.

All of which carries out the plan of the act as announced in the *Texas case*. In other words, there is no compulsion in this act, as

we read it, from beginning to end. There are matters which are protected by injunction, such as the right of interference. There are further matters that have been added by the act of 1934, which provided penalties in misdemeanors, but the scheme of the act is unchanged and remains the same as found by this Court in the *Texas case*.

The Government apparently—we certainly got the impression from the Government's brief and the argument both that the Government, as amicus curiae, agreed with our position that "treat with as" meant "recognize." Reading their brief now, I am not quite sure what position the Government takes, but I must read this paragraph from page 12 of the Government brief, in which the Government says [reading]:

Every portion of the statutory plan ultimately depends for its success on the willingness of carriers to confer with the representatives of their employees.

That is our whole case. We say that the willingness of the carriers to confer with the employees produces peace; that a forced conference will not produce peace. We furthermore say that a court of equity is without power to enforce a conference which depends for its results on the state of mind or the good faith; in other words, a decree to enforce a conference would not only be in practice unsuccessful in promoting peace under this act, but as a legal proposition, equitable proposition, it is a type of decree which a court of equity would not grant. We have quoted cases in our brief.

Justice McReynolds. I have been trying to follow you, but I must confess I cannot do it. For some reason or other I am inclined to think you are assuming that I know a lot more about this statute than I do, because I don't know anything about it except in a general way. I cannot get it from what you have stated so far.

Mr. Piper. Do you think I have not been particular enough in describing the statute? I will take another try.

Justice McReynolds. No. You have not put in plain enough language, I suppose, what you are after. What did the court below do?

Mr. Piper. The court below passed a decree requiring us to meet in conference and negotiate with the federation.

Justice McReynolds. That is what you are complaining about, is it?

Mr. Piper. That is one thing we are complaining of, yes; and the main thing.

Justice McReynolds. What is the next thing?

Mr. Piper. They say that under 2, ninth, we require them to do that.

Justice McReynolds. All right.

Mr. Piper. The next thing was, we complain that if that interpretation of the court is correct, then our liberty of contract has been interfered with.

Justice McReynolds. If the statute goes that far it is contrary to the Constitution?

Mr. Piper. That is what we claim.

Justice McReynolds. What is the next?

Mr. Piper. The next point is, we claim the act as a whole is unconstitutional, because it covers in terms intrastate matters as well as interstate matters; and there is no distinction. It is admitted that

the employees on this road are embraced by the act, all of them. We hope to show Your Honors that some of those employees—the backshopmen, in this case—are engaged in intrastate activities which have no direct bearing on the interstate part of this carrier's business. We propose to show, or expect to show, Your Honor, that this backshop—where these 222 men are employed—could shut down tomorrow without any interruption whatever to the interstate business.

Justice McReynolds. That point is clear enough. What is the next point?

Mr. Piper. All right. The next point, Your Honor, was the question of whether the Mediation Board's certificate——

Justice McReynolds. What?

Mr. Piper. Whether the Mediation Board's certificate was in proper form, and whether the rule should be in electing a representative that that representative should be elected by a majority of all of the eligible voters in each class or whether a majority of those voting. We claim that the lower court made an error and the C. C. A. made an error in finding that the majority of those voting, provided a majority voted, was correct.

Justice McReynolds. That is the construction of the statute?

Mr. Piper. Yes.

Justice McReynolds. What else?

Mr. Piper. Then the next point was the question of the effect of the Norris-LaGuardia Anti-injunction Act on the type and scope of the decree which the lower court granted in this case. We claim that the matters on which the lower court based its decree were protected by the provisions of the Norris-LaGuardia Act, an injunction act which was passed in 1932.

Justice McReynolds. You mean that this was a dispute on which no injunction should issue? Is that what you mean?

Mr. Piper. Well, we say the court bottomed its decree on this so-called Sasser statement. We claim that the Sasser statement was giving publicity to facts. We claim that the Sasser statement and other matters of that kind on which the court bottomed its decree were permitted under the Norris-LaGuardia Act, which permits either party to a dispute to give publicity to facts relating to the dispute. That is number one.

Then we say that the other acts that the court considered as the basis for its decree were the acts of the master mechanic and a foreman, and the testimony on which they dissuaded, or said they dissuaded, people from voting for the Federation at this election. We claim that the Norris-LaGuardia Act provides that that cannot be made the basis of an injunction unless it is shown by clear proof that the acts complained of were either authorized or ratified by the railway, and we claim that the record shows to the contrary. There is nothing in the record to show.

Now the Norris-LaGuardia Act, as limiting this act, is a more or less technical defense, in a sense, but the act itself says it must be strictly complied with in the granting of an injunction in a labor dispute, and we say that the act cannot be strictly complied with, on this record, to justify the decree that the lower court entered.

So we have five main points, Your Honor.

Justice McReynolds. Which one are you going to take up first?

Mr. Piper. And the point that I have been arguing was the point of what is meant by "treat with as" in section 2, ninth.

Justice McReynolds. That is the construction of the statute?

Mr. Piper. Construction of statute; yes, Your Honor. And our point is that "treat with as", when you view the history and look at the language in the first place, view the history of the act as a whole, and when you look at the decisions of this Court construing acts which preceded this act, there can be only one proper interpretation of that language, and when Your Honor spoke to me I was just explaining that section 5 of the act——

Justice McReynolds. Where is it in the book, please?

Mr. Piper. The copy of the act, Your Honor? I think the best place to find it is in the Government brief, because it gives the old act and the new. It is a very nice arrangement.

Justice Sutherland. Page 31 of the Government's brief.

Mr. Piper. That is the best place for it, I think. Counsel for the Government has taken the trouble to put the 1926 act in as one.

Justice Sutherland. Before you resume, let me ask you a question.

Mr. Piper. Yes, sir.

Justice Sutherland. If you eliminate from the act what you call the employees who are not engaged in interstate commerce——

Mr. Piper. Yes, sir.

Justice Sutherland. And lay aside for the moment the complaint under the fifth amendment——

Mr. Piper. Yes, sir.

Justice Sutherland. Then would you say that this act was not a regulation of interstate commerce under the Constitution?

Mr. Piper. I would say the act was a regulation of interstate commerce.

Justice Sutherland. Then so far as that question is concerned, it depends wholly upon the proposition that it embodies employees who are not engaged in interstate commerce?

Mr. Piper. Yes, sir. There is no disagreement between us and the other side on that law.

Justice Sutherland. I just wanted to understand that.

Mr. Piper. That eliminates the question of the application of fact.

Justice Sutherland. I just wanted to be sure of that.

Mr. Piper. Passing on to the question which I was just discussing a moment ago, and that was that in the amendment of 1934 Congress evidently had in mind the possibility of failure or refusal of either the representatives of the employees or the railway carrier to go into a conference. So they added to the act a procedure to be followed in case a conference was refused. That is the procedure, we take it, that should have been followed here. We say that a reasonable construction of the act, based on its history and its wording, does not give the words "treat with" any such significance as argued by the respondent and the Government. We say "treat with as" means "recognize." We admit that if we want to change agreements under the act and the act is otherwise constitutional, we must "treat with", but we say there is nothing in the act, the penalty clause, or any other provision in the act, even on the important subject of rates of pay and working conditions, which requires a forced negotiation. We say that section 5 was passed to cover this case where conferences were refused. We say that the procedure now in the act where a conference is refused permits either party to call in the services of a Mediation Board. The duty of the Mediation Board is to try to mediate the

dispute. The dispute here is whether or not we will insert the federation's name into the existing agreement—and I might call attention to the fact that the existing agreement is in existence whether the federation's name is in there or not—whether we will insert in the existing agreement the federation's name and whether we will add to the scope of that agreement other classes of mechanical department employees which were not included in the Mediation Board's certificate.

I have pointed out that the act as interpreted by the lower court would produce the anomalous situation that, if there were no dispute and no election, its compulsory obligation to treat could not be enforced; that if the act only applies to a case where there is dispute in the certification, I also want to point out that Congress particularly gave its reasons for the purpose of section 2, ninth.

Section 2, ninth, was passed, in the view of the Commerce Committee report to Congress, solely to cover a situation which the employees found disadvantageous, where they claimed one representative and the railway claimed another representative, and there was no means in the act to determine the proper representative, and section 2, ninth, was passed for that purpose and only for that purpose. That is shown on page 24. This is a report of the Committee on Interstate and Foreign Commerce.

Justice SUTHERLAND. Page 24 of your brief?

Mr. PIPER. Of our brief; yes. This was the purpose of that section 2, ninth [reading]:

> The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by the railway management, but it does not provide the machinery necessary to determine who are to be such representatives.

Then it goes on to say that this has been denied, and it says that, "This bill is designed to correct that defect."

That is such a plain statement, and the section 2, ninth, itself is so plain, that the only purpose of passing section 2, ninth, was to protect the employees in their right to choose a representative, and that was the sole purpose.

It is perfectly true that the act says when a representative has been selected we shall treat with that representative, but we say that that means that we must recognize or regard, but it does not force us into a compulsory negotiation, which is, as we view it, with all the other voluntary features of the act, what the Chief Justice said in the *Texas case* was the very essence.

Now, I must pass on to the next point, which I can discuss quite quickly. That is the interference, if this interpretation of the lower court is followed, of the fifth amendment. Briefly, we say, under *Adair* v. *United States* (208 U. S. 161), and similar cases, we have the right to have business relations with anyone we choose, or decline to have them. If forced into business relations or conferences against our will, it is a breach of our constitutional right of freedom. The *Adair case* (p. 173), adopts a quotation from Cooley on Torts, in which it says [reading]:

> It is part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.

We say that under *Morehead* v. *Tipaldo* (298 U. S. 587), freedom of contracting is a general rule and restraint is the exception. We say that this is permanent railway legislation, and in this case there are no exceptional circumstances permitting an infringement of that liberty of contract. We say, if a negotiation with the federation is not exclusive, as this decree requires it to be, to some extent we get rid of the ban of the fifth amendment. You see, the lower court held that not only we must negotiate, but we must negotiate exclusively with the federation. We say that that requirement of the decree is an interference with our liberty of contract; that we still reserve the right, or should have the right, to negotiate with others; that the right to give the majority the control over the minority in important matters of rules and rates of pay is, as this Court said in *Carter* v. *Carter Coal Co.* (298 U. S. 238), the delegation of an authority of the most obnoxious kind. But that matter is a matter for the employees to argue, not for us. I just merely mention it in passing.

Passing on then to the question of the unconstitutionality of the act in its entire——

Justice SUTHERLAND. Do you attach any importance to the fact that the railroad company is engaged in a business charged with the public interest?

Mr. PIPER. Oh, I do, Your Honor. I do indeed. I think that the Congress can go further in regulating an interstate carrier than it can in a private business, such as was done in the *Carter Coal case*. I don't think that the fact that the authorities, as quoted by the other side, hold that the carrier holds itself out and must do business with anybody at all, has anything to do with this case; but I do think, as was said in the first *Employers' Liability case*, the fact that it is an interstate carrier does not commit all of its business to congressional control, both interstate and intrastate. I do attach importance to the fact that it is an interstate carrier, and I think, if we are wrong in our assumption that back-shop work is not interstate and does not bear on interstate commerce, why then naturally it would come under such regulations.

Our point is no dispute with the law, Your Honor. We agree on the law. It is the application to the facts. We claim that these backshopmen are situated at a division point at Princeton in a shop by themselves. The running repairmen are in gangs out over the road from West Virginia to Virginia. We claim that they are an isolated, separated group of men doing work on articles withdrawn from interstate commerce. We claim their work is no different from work in the repair shop of the Virginia Bridge & Iron Works or the Richmond Locomotive Works, and the fact that they happen to be supplying their carrier is of no significance, because we argue, and the record shows, that that back shop could be shut down tomorrow and the same work that is being done there could be done at the Richmond Locomotive Works and the Virginia Bridge & Iron Works.

Justice SUTHERLAND. Then do I understand you that your argument with reference to the fifth amendment is confined to the backshop employees?

Mr. PIPER. Our argument on the fifth amendment is confined to——

Justice SUTHERLAND. I meant the freedom of contract.

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Mr. PIPER. That is right; the freedom of contract argument is that it is our right to refuse business negotiations with any one, and this interpretation of the act forces us into a negotiation. I had lapped over then into the other constitutional point of the act being void as a whole. I thought that was what Your Honor was inquiring about.

Justice SUTHERLAND. You attack that on the ground it is a prohibition of the right to contract?

Mr. PIPER. That is right, sir.

Now the other point about the back-shop employees, the basis of that argument is that this act covers interstate and intrastate commerce, and under the *Employers' Liability Act case* this Court cannot make judicial legislation by adding words to withdraw the intrastate employees from the scope of the act. If they could strike out words, perhaps yes, but the only way to make the act constitutional if the first *Employers' Liability case* stands as a law, which it has for 30 years, is to strike out, by excepting from the terms of the act, employees engaged in interstate commerce. In the *Employers' Liability case* the Court took judicial notice of the fact that there were many employees on an interstate carrier which were not engaged in interstate commerce, and the Court used by way of illustration this very class of labor, railway employees engaged in shop labor, as one of the illustrations where on an interstate carrier you could have men working who had no direct connection with interstate activities.

I would say that that is our case here, and if that is a fact, the Court cannot save the statute by adding words of limitation, although Congress in the first place could have passed an act leaving out of consideration or out of the terms of the act the employees which were engaged in intrastate commerce.

The court below, on this point of back-shop work, the circuit court of appeals, used the strike standard as a test. The court below said that if there was a strike in the back shop it would directly interfere with interstate commerce. We reply that the strike test is not a test, because any interruption to manufacture, no matter how local the plant, does indirectly interfere with interstate commerce, and if this work done in back shops is similar to local manufacture in other local plants, the fact that it indirectly affects interstate commerce is not conclusive. We further say that the record shows that the back shop could be closed tomorrow and there would not be a single train which would fail to move.

The Government argues, and respondent, that the act is separable and that the infected parts may be taken from the act and the act saved. I won't go into that further, because I have covered it slightly, but in the brief we have the *Trade Mark cases* (100 U. S. 82), the *Election cases* (*United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman;* 190 U. S. 127) and the first *Employers' Liability case* (207 U. S. 463), and *Hill* v. *Wallace* (259 U. S. 44), which in effect say that, even with the separable clause in, you cannot add words of limitation to save a statute.

I will next come to the certification of the Mediation Board. We argue that that certification was held under an improper rule. It is not so important in this case, as there is only one class involved, but it is very important to the proper administration of the act, and I think the Government will agree that a ruling on what the majority vote in this act means would be most helpful, and it does directly bear on our case.

The point at issue is whether, when the act says under section 2, fourth—I will read the exact language——

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

The question there is, what does the act mean by "majority"? As applied administratively, until this case was decided, the Department concluded that a majority meant a majority of the eligibles. In fact, when they sent the mediator on this property, Mr. Bronson, he checked the authorizations against the eligibles, and not finding a majority there, refused to certify. That was an administrative interpretation of what the word "majority" means.

We read it that a majority means a majority of the eligibles, and we come to that interpretation partly by considering the purposes of the act, namely, to prevent strikes and to produce peace and contracts. If it does not mean a majority of eligibles, it means you can go to a vote and use a different rule and say a majority of those voting. Your Honors can readily see that that means that 26 percent in number of employees of any class under the Government's interpretation can act for the whole class.

The CHIEF JUSTICE. Was there a majority of those eligible in any of these cases?

Mr. PIPER. There was a majority in four out of the six classes, sir.

The CHIEF JUSTICE. Are both the other two classes here?

Mr. PIPER. One of the other two classes is here, because the Court held as to that class that a majority participated and that a majority of that majority voted.

The CHIEF JUSTICE. That is the blacksmiths?

Mr. PIPER. That is right.

The CHIEF JUSTICE. That is to say, if a majority of the eligibles participated?

Mr. PIPER. That is right. Then a majority of those voted for the federation and the federation was duly elected. In the car men and coach cleaners, where less than a majority participated, the court allowed them certification though.

The CHIEF JUSTICE. And that is not here at all?

Mr. PIPER. That has not been appealed from and that is not here at all. The only thing that is before this Court is the blacksmiths. That is the only class. The other classes, if in other respects the election was proper, they have been certified.

The CHIEF JUSTICE. What do you mean by "eligibles"?

Mr. PIPER. Why, I mean by "eligibles" the men that show on the pay roll as eligible to vote.

Justice VAN DEVANTER. The statute does not say anything about eligibles, does it?

Mr. PIPER. No, sir.

Justice VAN DEVANTER. What are the words that it does use?

Mr. PIPER. It says, "A majority of any class or craft of employees." The only reason I use the word "eligibles", we have employees in various classes, and in order to find out who is entitled to vote you have got to go to the railroad company's books and get the names of

the men in that class, which then entitles them to vote, and I merely use the word "eligible" to show that the company's books show that John Smith, machinist, is entitled to vote.

Justice VAN DEVANTER. But you are going outside the statute on that. The question is, What does that language mean?

Mr. PIPER. The language means the majority of the employees of any class, leaving the word "eligible" out.

Justice VAN DEVANTER. What is its exact purpose? It does not say "eligible" at all.

Mr. PIPER (reading):

> The majority of any craft or class of employees.

Justice VAN DEVANTER. Yes; "craft or class."

Mr. PIPER (reading):

> Craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

I will pass on from that point, Your Honor, and briefly describe our position on the Norris-LaGuardia Act. The Norris-LaGuardia Act was passed in 1932. Its first section provides that—

> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; * * *.

Then announces the policy, and then goes on to limit the jurisdiction of the courts of equity in the granting of injunctions in labor disputes.

We say that the act can be construed——

The CHIEF JUSTICE. Where is the text of that?

Mr. PIPER. It is in our brief, Your Honor, in the appendix, page 74 of petitioner's brief, excerpts from it, the ones that are important in this case.

The CHIEF JUSTICE. What is the language of the act that you say prohibits this injunction?

Mr. PIPER. We say that the court bottomed its injunction on publicity given to facts in connection with a labor dispute, and that under section 4 of the act, which is at the top of page 75 of our brief, there is especially the prohibition:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> * * * * * * *
>
> (*e*) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

The CHIEF JUSTICE. What is the language of the decree which you say is in conflict with the Norris-LaGuardia Act?

Mr. PIPER. The language of the decree—the decree is found on page 27, I think, of the record.

The CHIEF JUSTICE. I mean the particular part of the injunction which infringes this act, in your judgment.

Mr. PIPER. Yes, sir. It is section 2 of the decree at the bottom of page 282, which, the opinion will show, is based on the bulletin, the bare statement——

The CHIEF JUSTICE. Whatever it is based on, what is the language of the decree which you say infringes the act?

Mr. PIPER (reading):

> That the defendant, its officers, agents, and employees, be and they are hereby enjoined and restrained of and from, directly or indirectly, in any way, manner, or form, or by any means whatsoever, interfering with, influencing, or coercing any of its mechanical department employees with respect to their free and untrammeled right of selecting or designating their representative or representatives for the purpose of making and maintaining contracts with the defendant relating to rules, rates of pay, and working conditions, or for the purpose of considering and deciding disputes between the mechanical department employees of the defendant, and the defendant, as well as for any and all other purposes of the Railway Labor Act.

Now our argument there, Your Honor, is that the lower court is in clear error in taking as a basis for that restraining order the facts which they gave as the basis for the order. The court gives in its opinion and in its finding the basis for that restraining order, and we say, our point is that, that section of the Norris-LaGuardia Act and the following section, which does not hold the railway responsible for any acts of employees unless approved or ratified—we say those two things in the Norris-LaGuardia Act take out from this case every fact on which the lower court based the restraining part of its decree, and we say that there is no inconsistency between the Norris-LaGuardia Act and the Railway Labor Act, and, even though the amended Railway Act was passed subsequently, the two acts should be given some relationship and can and properly should be read together, and it was perfectly proper for the Congress to pass an act in '34 with the Norris-LaGuardia Act in front of it, which required in these labor disputes other things than facts, the publication of facts, to show influence and coercion.

The CHIEF JUSTICE. Then is it your contention that, by virtue of the Norris-LaGuardia Act and this act read in connection with it——

Mr. PIPER. Yes, sir.

The CHIEF JUSTICE (continuing). That under this later act the court had no power to prevent coercion or intimidation?

Mr. PIPER. No, sir.

The CHIEF JUSTICE. What is it that prevents it there?

Mr. PIPER. Oh, no, sir. I merely say that if they actually prevent coercion, influence, and so forth——

The CHIEF JUSTICE. That is where there is proof to support it?

Mr. PIPER. Correct. This is a question of proof.

The CHIEF JUSTICE. But a question not of a decree but the foundation for it?

Mr. PIPER. Exactly. I think we can roughly say, in view of that record and in view of the Norris-LaGuardia Act, there is clear error in that decree of the lower court.

The CHIEF JUSTICE. If there were sufficient facts to support the finding of an influence or diversion of authority that was contrary to the terms of the act, there would be nothing in this decree or the Norris-LaGuardia Act which could be complained of?

Mr. PIPER. That is right. This is again a question of application of facts to this decree.

Justice VAN DEVANTER. You are not complaining of the terms of the decree at all? You are complaining that there is not a foundation at all for the decree, is that it?

Mr. PIPER. Speaking of one part of it, Your Honor.

Justice VAN DEVANTER. What is that?

Mr. PIPER. Speaking of the restraining part.

Justice VAN DEVANTER. Point out the particular language. I have not yet understood you to name that particular language.

Mr. PIPER. In the Norris-LaGuardia Act you mean, Your Honor?

Justice VAN DEVANTER. No; in the decree. I have not understood yet what language in the decree you complain of.

Mr. PIPER. We complain of the decree as a whole.

Justice VAN DEVANTER. The decree as a whole?

Mr. PIPER. The first part of the decree we complain of because it forces us into a negotiation which we say is not justified.

Justice VAN DEVANTER. That I understood before.

Mr. PIPER. Yes. Then the next part of the decree, which I am now discussing, is the restraining part which restrains us from using influence and coercion and forbids us from treating with anyone. I say as to that part of the decree we certainly do not disagree with the law that a decree may properly issue to restrain us from influence and coercion—I say as to that part of the decree there is no basis for the decree, and, to emphasize that statement that there is no basis in the record for that restraining part of the decree, I call attention to the Norris-LaGuardia Act, which states that the facts which the court relied on, bottomed its decree on, namely, the Sasser statement, was merely giving publicity to facts, which is permitted by the Norris-LaGuardia thing, and the other thing that the court laid stress on were the two conversations of employees which tended to discourage, and I say the Norris-LaGuardia Act as to those says, unless it is shown by clear proof that the railway either authorized them or ratified them, they cannot be considered.

My time is up.

ORAL ARGUMENT ON BEHALF OF RESPONDENTS

Mr. MULHOLLAND. May it please the Court, the respondent, System Federation No. 40, Railway Employees Department of the American Federation of Labor, is a voluntary association——

The CHIEF JUSTICE. You appear for System Federation No. 40, respondent?

Mr. MULHOLLAND. Yes; consisting of machinists, boilermakers, blacksmiths, electrical workers, sheet-metal workers, and car men employed in the mechanical departments of the petitioner.

This voluntary association was organized prior to 1922 and reorganized in about 1934. Counsel for the petitioners made a very fair statement of the issues involved in this case.

I can readily realize it will be difficult to apply those issues without some knowledge as to the Railway Labor Act. Perhaps we can short cut with an understanding that the purpose of the Railway Labor Act is to protect interstate commerce against interference by reason of disagreements or strikes or lock-outs or matters of that kind occurring upon the railroads. It is not a new policy of Congress, but runs well back into the last century, and I am sure that the Court is familiar with the many statutes that have been enacted in attempting to accomplish that purpose. The matter has been before this Court, and I believe that this Court has sustained the right of Congress to encourage collective bargaining for that purpose.

On all the questions that have been raised by petitioner the respondent has endeavored to answer by brief. It will be impossible

to cover them all in the time that is allowed me. The Government has appeared as the friend of the Court, has filed an excellent brief, with which the respondent is in complete accord, and which is to be further argued by the Solicitor General. In order to conserve our time and to avoid any duplication of efforts, we have agreed that I shall endeavor to present the facts in the case to support our claim that the Railway Labor Act, including section 2, ninth, imposes upon the petitioner an obligation to treat with the respondent which is enforceable in a court of equity, and if time permits I will discuss the majority question raised under section 2, fourth, and section 2, ninth, of the act.

The Railway Labor Act of 1926 by paragraph third provided:

> Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

That section came before this Court in the *Texas case* that has been referred to. Paragraphs third and fourth of section 2 of the act of 1934 reiterate the provisions of the earlier act, and in addition spell out the specific mandatory and prohibitory features of these enforceable general duties.

With that in mind, I call the Court's attention to this fact: For many years prior to and up to the filing of the bill of complaint in this case the petitioner interfered with, influenced, and coerced its mechanical department employees in such manner as to prevent their free designation of representatives and denied them a right to organize and bargain collectively.

As a means of accomplishing its unlawful purpose, the petitioner used its authority and power to organize, support, and maintain a company union known as the Mechanical Department Association of the Virginian Railroad, with which it treated as the representative of these employees for the purposes of collective bargaining.

Following the election that has been referred to and held by the National Mediation Board, it refused to recognize or treat with the federation as a representative of these employees, regardless of the fact that the federation was selected by the overwhelming majority of the employees in a secret ballot and the certification of that fact by the National Mediation Board.

In defiance of the mandate of the employees and the certification of the National Mediation Board, the petitioners continued to recognize and treat the association as the representative of the employees for the purposes of the Railway Labor Act.

The district judge in referring to that situation said:

> The railway acting through its officers and agents, has persistently interfered with the shop craft employees in their efforts to organize for the purpose of collective bargaining, one of the principal objects if not the dominant object of the Railway Labor Act. This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the railway in creating and promoting so-called independent organizations, both before and since the election and by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they come from an organization under its control.

Upon proof of these facts and to meet this situation, the decree of the district court ordered a mandatory injunction requiring that the petitioner shall treat with the Federation, and further enjoined the

petitioner from entering into any contract, agreement or understanding concerning rates of pay, rules, and working conditions affecting its mechanical department employees, except with the Federation.

Now we submit that, regardless of any question raised as to the enforceability of section 2, ninth, discussed by Mr. Piper, although insisting that section 2, ninth, is enforceable under the present act, we say that the decree of the court should be sustained as a proper application of the provisions of section 2, paragraphs third and fourth, protecting the employees in their right to freely select their representatives.

I am not in disagreement with the facts that were stated by Mr. Piper, but he has not stated all the facts, and it is the facts that were not stated that I think present the economic situation in this case which, if understood by this Court, the Court, I am sure, will find very little difficulty in applying the law to.

We claim that following a resolution adopted by the Railway Labor Board back in 1922, calling upon the employees of the carriers of the country to organize for the purposes of collective bargaining, this petitioner proceeded to organize its own company union. The trial court said of that organization and that attitude of the company:

> With respect to the formation and activities of this Association the testimony reveals that no employee knew just how or when he became a member thereof, that no dues were ever assessed or paid by members, that meetings were held only once every two years and then apparently for the sole purpose of electing officers and committeemen, that the notices of the elections were sent out from an office of the railway, that all expense incident to the organization and maintenance of the Association was defrayed by the railway, and that no substantial grievances were ever taken up by the Association representatives with the railway.

Justice SUTHERLAND. You are speaking of what you call the railroad association?

Mr. MULHOLLAND. I am speaking of what we call the association mentioned in the record and throughout the briefs, which we say was the company union.

Justice SUTHERLAND. You say they were under the control of the railroad?

Mr. MULHOLLAND. Yes, Your Honor.

This conclusion was amply supported by the testimony. While we haven't time to call attention to many of them, I want to just read from the record, from the transcript, the testimony of one or two witnesses.

John W. Munsey, an employee of the petitioner, a machinist with 11 years of experience, testified, as shown by the record:

> I did hold the offices of craft chairman and general chairman in the Mechanical Department Association—

that is the organization I am speaking of—

> As craft chairman, I represented my particular local craft of machinists, and as general chairman the system over all crafts. I was elected general chairman October 3, 1933, and held the office up to the present time. When you accept employment there you are considered a member of the association. I was a member by the mere fact that I was employed by the company. I never signed any application for membership. As far as I know, no one paid any dues. There was never any money in the treasury. I never attended any meeting of the association other than those called biennially to elect officers. The meetings were held in the shops on company time.

> In our election the company printed or had the ballots printed. So far as I know, there has never been a group meeting of the so-called membership of the association.

William M. Sarver was employed for 12 years, and from 1928 to 1931 served as the association's chairman, and he testified:

> I cannot tell the court anything else that might have made me a member of this association, outside of holding office in it. I never did pay any dues. I was first elected to office in the association about 1928 or 1929. I was elected as chairman of the Sheet Metal Workers. I served 2 years as general chairman and 1 year as division chairman; that is, 2 years of each. At the time I was at the head of this organization I cannot recall any meetings of the membership of the association being held other than to get the men together to appoint the officers to succeed me. * * * The ballots were printed in the office, as far as I know. I never saw the ballots until they came out for election.
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> * * * * * * *
>
> There were no general membership meetings where the members had a chance to say anything. As treasurer I did not handle any money; did not have any. There never was a cent in the treasury during the time that I was the treasurer, that I saw. The Virginian Railroad paid the bills.

Harvey C. Hearne, who also claimed to be general chairman of this association, and also general chairman of an organization we will treat of later, the independent organization, the leader of the opposition of the A. F. of L. organization, was called as a witness by the petitioner.

> In a way I am just about as hazy as the other men as to how I became a member of the mechanical department association. We had a contract and by-laws that specified special crafts and it is my understanding that every man who was a member of these crafts by that fact became a member of the mechanical department association. So far as I know I never signed any application any more than any other man. My participation was to vote in the biennial elections.

No less than 10 witnesses testified as to the lack of formal membership applications, meetings, and dues in this organization. The carrier printed the ballots used in the biennial elections of the association, supplied the meeting places where the elections could be held, and sent out notices for the association's affairs through the company's mails, all at its own expense. In addition, it supplied cash to the extent of at least $100 per year, and as an instrumentality in representing the employees in the adjustment of their grievances the association was entirely ineffective.

The membership in the association was maintained largely through the efforts of the carrier, inasmuch as employees working for the railroad were not permitted to affiliate with any other labor organization.

The association continued in existence without opposition till 1927, at which time these employees again began to organize themselves into organizations affiliated with the American Federation of Labor, and that continued until finally, after securing a number of authorizations, that is, voluntary, written, unofficial authorizations for the employees themselves, they asked the services of the old Board of Mediation created under the law of 1926 to mediate this dispute.

The mediator, as has been said, took these authorizations, checked them with the pay rolls of the company, and discovered that they did not constitute quite a majority, and that was in process of mediation at the time the Railway Labor Act amendments of 1934 were enacted.

Shortly after the enactment of the Railway Labor Act and pursuant to that act, as provided within section 2, paragraph 9, which has been read to this Court and which briefly provides that where a dispute has

arisen among the employees as to the representative, the matter can be referred to the National Mediation Board under the act of 1934 for the purpose of investigation and certification, the National Mediation Board took jurisdiction of this dispute. It decided, after a mediator had conducted an investigation, it would hold an election, which was done.

The district court found that all the testimony on that subject showed that the election was fairly and honestly conducted, and that everyone entitled to vote had full opportunity to exercise that right without hindrance or interference of the Federation or anyone connected with it.

On page 5 of our brief you will find the results of the election, and out of a total of 527 votes cast this association or company union received 19 votes. In other words, the total of the election was 429 to 98. If you split that up into crafts, the sheet-metal workers, the Federation, 137 to 9; the carmen, 98 to 20; the blacksmiths, 222 to 8; the electrical workers, 80 to 11, and the boilermakers, 51 to 9.

The National Mediation Board then on September 13, following the election, certified System Federation No. 40 as the representative of these crafts.

During the course of these events the carrier in many ways exerted its influence upon its mechanical-department employees in an effort to interfere with their choice of representatives and coerce them to the end that they would refrain from becoming members of these various unions affiliated with the Federation, or select the Federation as their representative.

In the fourth finding of fact of the district court he stated:

> The court doth further find from the evidence that, by means of personal interviews, posted bulletins and by the circulation of a pamphlet calling the attention of its mechanical department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant sought to influence its mechanical department employees against any participation in or association with a standard labor organization, and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical-department employees from exercising their free and untrammeled right to choose their own representative.

Justice BUTLER. Would you give me the record reference to that?

Mr. MULHOLLAND. 281. The pamphlet mentioned was the so-called Sasser statement to which my friend on the opposition has referred.

This was issued by the superintendent of motive power of the Virginian Railway, J. W. Sasser, that is, over his signature, and he is the chief operating officer over these mechanical-department employees. I asked him who prepared that statement and he testified that it was prepared by a committee consisting of the president and vice president of this railway company, its labor counsel, its superintendent, of motive power, and its superintendent of personnel. It must have been a very important situation that required the attention of so many officials, and when I inquired of the superintendent of personnel why he had the general counsel there he replied, you will find in the record on page 71: "We had our general counsel in on it because we thought best, with the law that was confronting us, to be on the safe side of those things."

Speaking of this pamphlet issued by Mr. Sasser, the court below said:

> I hardly think that anyone can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to "use the authority and power" of the railway "to induce action" by the members of the craft "in derogation of what the statute calls 'self-organization.'" That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a reasonable inference to be drawn from the situation and power of the author over those to whom it was addressed.

The personal interviews to which the court referred in its finding of facts consisted of payments made by foremen of the carrier, referred to by Mr. Piper, advising the employees to vote against the federation if they wished to continue in their employment, and in further statements to the effect that to remain away from the polls on the election day would be a vote in favor of the company.

The court in reaching the conclusion set up in its fourth finding of fact carefully weighed this evidence, as is shown from the discussion of it in the opinion. After the National Mediation Board had issued its certification, certifying the federation as the representative of the mechanical-department employees, the carrier refused to recognize it or to treat with the federation as such representative of the men. The court said that instead the defendant—

> By and through its officers, agents, and servants, undertook, by means of the circulation of a petition or petitions addressed to the National Mediation Board, to have the certification of the National Mediation Board aforesaid, altered, changed, or revoked, so as to deprive its mechanical department employees of the right to representation by said System Federation No. 40, Railway Employees Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual mechanical department employees by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board.

The Independent Shop Crafts Association referred to throughout the record and the briefs as the "Independent" was ostensibly formed by an employee named H. C. Hearne. The story of its organization appears in the cross-examination of Hearne, who was a witness in the court below. The trial court analyzed this testimony in its opinion and stated the following as its conclusion:

> The indications from his actions and the testimony are strongly to the effect that Hearne in organizing the Independent was not in good faith representing the crafts but was in fact acting at the behest of the railway. And upon the whole case the evidence indicates unmistakably that the real contestants in the election were the Federation and the railway, that such is the situation in the controversy involved in this litigation, and that the parts played by the Association and the Independent in those contests have been very largely that of mere figureheads.

The election was held in August 1934. The certification was issued on September 13, 1934, and from September 21, 1934, to the filing of the bill of complaint in April 1935, diligent efforts were made to secure recognition on the part of the federation as the representatives of the employees involved in this dispute; but, upon the persistent refusal of the carrier to recognize the certification of the National Mediation Board or to treat with the federation, and upon its persisting in its long-time policy of building up a company-controlled labor organiza-

tion among its mechanical-department employees, respondents filed this action in the district court seeking injunctive relief in two respects:

First, they sought a prohibitory injunction restraining the carrier from further acts of interference, influence, or coercion toward the employees in question; and, second, they sought a mandatory injunction compelling the carrier to treat with the federation as the representative of these employees as required by section 2, paragraph ninth of this same act, wherein it is provided that "upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this act."

The relief prayed for was granted in both respects by the lower court, and in reaching this result the district court, as we have said, entered into an exhaustive survey of the evidence and made extensive findings of facts. In these findings the circuit court of appeals expressly concurred, saying:

> The judge below heard the case fully and carefully and correctly analyzed the evidence in his opinion reported in 11 Federal Supplement 621, to which we refer as a sufficient statement of the facts.

And further the court of appeals said:

> A careful study of the evidence convinces us that these findings are amply supported.

We understand that it is a settled rule of this Court that where two lower courts have concurred in their judgments as to the facts in the case the Supreme Court will not disturb their findings unless palpable error or manifest injustice has been done. I think that the that of *Peck Manufacturing Company* v. *General Motors Corp.* (298 U. S. 648). It is also asserted as a rule in the decision of the *Brotherhood of Railway Clerks case*, to which many references have been made and will be made in the course of this argument.

We have asserted that the decree of the district court should be sustained as a proper application of the provisions of section 2, paragraphs third and fourth, of the act. We now come to the consideration of the question: Does section 2, ninth, impose upon the carrier an obligation to treat which is enforceable in a court of equity? And this is the only phase of our presentation that I will be able to argue, leaving the constitutional questions to be presented by the Solicitor General, and, if the Court please, I did not note the time I started. Was it a quarter of three?

The CHIEF JUSTICE. You have taken half an hour.

Mr. MULHOLLAND. Half an hour.

Section 2, ninth, has been read several times. Perhaps all I will need to refer to, having in mind that by section 2, ninth, a dispute existing as to representatives, either party may invoke the services of the National Mediation Board to settle the dispute; and, having in mind that the National Mediation Board as a part of their investigation may hold an election of the employees to ascertain their choice, and requiring the National Mediation Board to certify that fact to the employees and the carrier, the act then provides:

> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this act.

As I have said, it has been the experience in the past that interstate commerce is subject to delays and interruptions which have their source in disputes between carriers and employees, and which result in

losses both to the participants and the members of the public. Congress has sought to minimize or eliminate these losses through a long course of legislation whose basic purpose has been and is to provide the means whereby these labor disputes may be settled before they attain proportions sufficient to jeopardize the carrying on of the commercial process.

The statutory plan throughout this course of legislation has been to encourage the adjustment of disputes in conference between the parties and to provide for the formation of special tribunals to assist in such adjustments if private negotiations fail. The various statutes dealing with this matter have naturally not been identical in their details. As one means of carrying out the basic purpose has been found ineffective, another has been substituted, but the purpose itself has not been changed, nor has the general plan for carrying it into effect been fundamentally altered. This general pattern, running as it does through a whole series of legislative enactments, constitutes a valuable addition to the sources upon which the Court is privileged to draw in interpreting the provisions of the contemporary statute.

The Transportation Act of 1920 was enacted at the time of the termination of Federal control, when the carriers were being returned to their respective private managements. Title III of this act related to labor relations between these carriers and their several employees. It contained, in the first place, a statement of general duties, the carrying out of which would, it was believed, make for amicable relations between the parties.

In addition, the statute provided for the formation of a special tribunal known as the United States Railroad Labor Board, whose duty it was to give consideration to disputes between carriers and their employees.

This statute came before this Court for interpretation in two cases, as has been said. Both grew out of the same labor controversy between the Pennsylvania Railroad Co. and its shop-craft employees. The first case was *Pennsylvania R. R. Co.* v. *Railroad Labor Board* (261 U. S. 72). The action was one seeking to enjoin the Board from publishing a decision adverse to the carrier. The Court decided that an injunction had been properly refused. It held that the decisions of the Board were unenforceable by legal process, hence that their publication was not enjoinable.

The second *Pennsylvania case* was *Pennsylvania Railroad System Federation No. 90* v. *Pennsylvania R. R. Co.* (267 U. S. 203). The question here did not relate to the enforceability of a decision of the Labor Board but to the enforceability of the general duties prescribed by section 301 of the act. The plaintiff sought to base an action for a mandatory injunction upon an alleged breach of the duties set up in this section.

While the question presented to the Court was not identical with that involved in the first *Pennsylvania case*, the Court considered its ruling in the first case conclusive as to the second. It was accordingly held that section 301 of the Transportation Act did not set up any duties enforceable by process. It was concluded that the mere existence of these enforcement provisions, invoking as they did the force of public opinion only as the enforcing medium for one portion of the statute, argued that other portions of the same statute were not intended to be enforced by legal process.

It seems to us, therefore, that the *Pennsylvania cases* thus establish no general rule of statutory construction to the effect that any duties between carriers and employees set up by any act of Congress are not intended to be legally enforceable. The decisions in both cases are based squarely on the somewhat unusual enforcement provisions contained in the Transportation Act.

Of course, as we will all agree, it later developed that the congressional hope that the economic interest of the public would prevent the development of serious or widespread labor disputes was doomed to disappointment. Either the members of the public were apathetic or the disputants showed less respect than contemplated for public opinion. In any event, the act failed in its purpose, the Railroad Labor Board lost caste, its decisions were openly flouted by both the employers and the employees, and the whole enforcement machinery of the act broke down.

These facts gave rise to a dangerous situation, of which the carriers and the employees were both aware, and after a series of conferences of the leaders on both sides, it was decided to request of Congress the passage of a new Railway Labor Act. The result was the enactment of the Railway Labor Act of 1926, which was sponsored, as I say, jointly by the carriers and by the railroad labor unions.

The new statute preserved some of the features of the old but added a number of new ones. Title III, section 301 of the Transportation Act was substantially reenacted. The United States Railway Labor Board, however, was abolished, and there was substituted in its place a tribunal known as the National Board of Mediation. Its function, however, was not to decide but to endeavor to mediate disputes. Minor disputes relating to grievances or disagreements concerning the application or interpretation of existing agreements between individual carriers and their employees could be submitted to boards of adjustment set up on the properties of carriers or groups of carriers and composed of representatives of employees and carriers in equal numbers. The establishment of such boards, however, was made permissive and not mandatory.

The act further provided for voluntary arbitration of disputes, the awards to be legally enforceable.

It provided also for the creation of emergency boards and required under certain circumstances that all parties hold things in status quo until the remedial features were put into operation.

In addition, the act of 1926 contained this clause, which I have read:

> Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self organization or designation of representatives by the other.

As I said, this section was before this Court for interpretation in the case of *Texas & New Orleans Railway Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548). It was argued that that provision was not intended to be an enforceable obligation, because it contained no specific provision for its enforcement. There also the *Pennsylvania cases* were cited in support of this contention. This Court, however, did not sanction that position, and said:

> It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect.

Now, certain carriers were able to avoid the manifest intention of the Congress as expressed in the Transportation Act of 1920. So were certain of them able to avoid compliance with the same general intent as expressed in the act of 1926.

The history of the Virginian Railroad, to which I have referred, and its relation to the company unions, found by the lower court to be mere figureheads, is typical of this situation in some of the railroad companies in this country at that time. The methods adopted were usually about as follows: A company union was organized and entered into an agreement with the carrier. Any claim of any other organization of a right to represent the employees involved was met with a protest from the figurehead union. The carrier then stated that, in view of this dispute, it must continue to recognize the company union until the question of representation was settled.

Under the act of 1926 the only recourse of a party was to invoke the services of the Board of Mediation, as was done in the early stages of this case. The Board, as organized under the 1926 statute, did not have any authority to decide anything. It could only meet. Mediation cannot be successful where any party enters the proceedings with a fixed determination to yield nothing. Thus the whole matter of representation could be successfully stalemated by a carrier through simply refusing to recognize the claim of any other than its company union to represent its employees. This situation of stalemate existed on the Virginian Railway Co.'s plant and property at the time the amendments to the Railway Labor Act of 1934 came into effect.

The existence of this and similar situations was called to the attention of the congressional committee which investigated the bill prior to its passage. At page 27 of our brief we have called attention to the testimony of Mr. George M. Harrison, appearing on behalf of the 21 railway labor organizations.

The CHIEF JUSTICE. We will hear you on that tomorrow.

(Accordingly, at 4:30 p. m., an adjournment was taken until 12 m. on the following day, Tuesday, February 9, 1937.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY, PETITIONER

v.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL., RESPONDENTS

ORAL ARGUMENT

WASHINGTON, D. C., *February 9, 1937.*

The oral argument in the above-entitled matter was resumed before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 12:10 p. m.

Appearances:

On behalf of the petitioner: Mr. James Piper and Mr. H. T. Hall.

On behalf of the respondents: Mr. Frank L. Mulholland.

On behalf of the United States as amicus curiae: Hon. Stanley F. Reed, Solicitor General of the United States.

The CHIEF JUSTICE. Proceed with the cause on argument, No. 324, the Virginian Railway Co. against System Federation No. 40.

Mr. MULHOLLAND. May it please the Court.

The CHIEF JUSTICE. Mr. Mulholland.

ORAL ARGUMENT ON BEHALF OF RESPONDENTS—Resumed

Mr. MULHOLLAND. Prior to adjournment I was endeavoring to direct the Court's attention to the historical background of the Railway Labor Act of 1934. I had called Your Honors' attention to the provisions of the act of 1920 and the interpretation of this Court as to the general duties prescribed in that act and as expressed in the *Pennsylvania cases.* I directed your attention to the decision of this Court as to certain enforceable duties that found their way into the act of 1926. I now desire, and very briefly, in closing, to call the Court's specific attention to those provisions of the Act of 1934 which we think clearly indicate the intention of Congress to make the duty to treat an enforceable obligation.

Section 2, ninth, it will be remembered, required the carrier to treat with the representatives of employees for the purposes of this act. We should consider, therefore, what are the purposes of the act and

what compulsion was placed upon carriers generally by other provisions of the act in relation to these purposes.

It is apparent that the purpose of treating, as expressed in this act, must be to adjust differences between the parties. The phrase "purpose of this act", accordingly, must refer to the settlement of disputes between carriers and employees. The system setup by the present statute for all carriers, regardless of whether a representation dispute exists or not, contemplates a measure of compulsion in the matter of treating with representatives of employees in the settlement of these differences.

For example, under section 2, paragraph eighth, all carriers are required to post notices to the effect that all labor disputes, of whatever nature, will be handled in accordance with the requirements of this act. The provisions of paragraphs third and fourth and fifth are made a part of every contract of employment between a carrier and its employees. Changes in agreements are made in accordance with section 6. This section clearly contemplates that conferences are to be held between the parties. The obligation of this section is made criminally enforceable upon carriers by section 2, paragraphs seventh and eighth. The provisions of section 6 of the act relating to conferences between the parties are certainly enforceable provisions. To this extent unquestionably Congress has imposed a legal obligation upon all carriers to treat with employees' representatives.

Other types of cases, that is, those relating to the interpretation and application of existing agreements, are handled in a somewhat different manner. The parties, however, are here again commanded to confer with regard to the matter. If conferences fail, then the dispute may be referred to the National Board of Adjustment. Either method of procedure outlined by the statute results ultimately in the parties coming into definite legal obligations. Decisions of the National Mediation Board may be enforced by definitely outlined procedure. Acts of the National Mediation Board are not thus enforceable, but the taking of jurisdiction by the Board places the parties under certain legal duties to maintain the status quo until the functions have been performed.

In the *Pennsylvania case* this Court indicated that where a system for the settlement of disputes resulted finally in no enforceable obligations the statements in the statute of general duties to be performed in the course of the adjustment process would not be intended to create a legal obligation.

The converse of this statement must be equally correct. Where the ultimate control of a statutory process is the undoubted creation of enforceable obligations, general statements of duties are given color by the proceedings to which they are related. Accordingly, there is specifically imposed upon all carriers an obligation to confer or treat with employees' representatives for the purposes of the act, that is, the adjustment of the disputes. These factors, it seems to us, give different significance to the language of section 2, paragraphs first and second, interpreted by this Court, in the *Pennsylvania cases*.

I feel well fortified in that position because of the decision handed down by Judge Parker as the unanimous decision in this case by the circuit court of appeals. That is the same court that decided the case of *Malone* v. *Gardner* (62 F. (2d) 15), where they held that the same provisions that were before this Court in the *Pennsylvania cases* did not establish enforceable obligations.

But coming to consider the present case, Judge Parker, speaking for the unaminous opinion of the court, said [reading]:

> We think it clear that the act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that "the carrier shall treat with the representative so certified (by the Mediation Board) as the representative of the craft or class for the purposes of this act", it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purposes of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the act might not be nullified by the carrier's refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. And it is no objection to this view that the parties are not bound to agree even though they may treat.

Petitioner, in spite of all of this, argues that this obligation to treat is imperfect, in that it is beyond the power of equity to enforce. Opposing counsel said yesterday that to treat implies negotiations in good faith, and good faith is a state of mind. That is true, but it seems to me the courts are frequently called upon in many types of cases to pass upon the good faith of a party and to estimate his state of mind by his acts. There are no doubt many instances in which good faith has been successfully concealed. That such may be the case has never been accepted as a valid reason why courts should be barred from inquiring into the facts and from seeking to enforce the law. The difficulty, if any, is one of proof and not of equity jurisdiction.

Furthermore, this argument of the petitioner is based purely upon the positive aspect of the statute and the decree of the district court and ignores the negative aspect. It must be kept in mind that in this case the carrier was not only ordered to treat with the federation as the representative of the employees in question, but as a necessary corollary was ordered not to treat with the company union.

Not only is the negative phase of this decree definitely enforceable, but it also assists in the enforcement of the positive phase. This assistance grows out of the economic relations of the parties. In dealing with numerous employees scattered over the many miles of a railroad's system it has been considered necessary by carriers that they negotiate general agreements defining the rights of whole classes or crafts of employees as units. If a carrier is prevented from treating with regard to the negotiation of such agreements with other parties, its own economic self-interest dictates that it treat for that purpose with the certified representative of the employees.

If a carrier may not be compelled to treat at least with representatives selected by the majority of a craft or class of employees, if it may continue without limit to treat with a repudiated company union, collective bargaining must inevitably fail, and the plan of the Railway Labor Act to provide for the amicable adjustment of disputes will be nullified.

Since the act of 1926 there has been but one strike of any significance upon the railroads of this country, indicative surely that the plan of Congress to protect interstate commerce from destruction by reason of these industrial disputes has succeeded.

Now, if Congress had authority in the first instance to safeguard the right of collective bargaining and make it an instrument of peace, as said by this Court, further enactments serving the same end, only more specifically, are neither arbitrary nor unreasonable.

I close with this thought and call the Court's attention to the fact that the petitioner is a common carrier, in the operation of a business peculiarly charged with public interest. Its business may therefore be regulated to a greater extent than is the case with other industries without infringing upon its constitutional guaranty of freedom of contract.

The petitioners seem to assert at least a claimed right to refuse to have business relations to any extent with anyone whom it chooses. Yet, no carrier would today insist upon the right to refuse to have business relations with a shipper presenting merchandise for transport when tendered the regular charge. Statutory regulations have been upheld as constitutional which prevent carriers from offering to contract with shippers on other than the basis of rates recently fixed by governmental authority. Privileges and rebates to individuals or localities have been prohibited, although established by the contract. Carriers may not contract to grant passes other than to those classes prescribed by law. In many other respects the private rights of carriers have been subjected to unique restrictions conforming to the importance of the service which they render to the public and the liability of the public to harm if that service is not constantly and justly rendered.

That the public is vitally concerned in labor disputes involving carriers and employees is obvious. The Railway Labor Act is designed to safeguard this public interest. The Railway Labor Act, unlike some other statutes, is very mild in form. It merely compels the carrier to negotiate or to refrain from negotiating with certain representatives of employees to the end that industrial peace and continuity of commerce may be maintained.

Thank you.

ORAL ARGUMENT ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

Mr. REED. May it please the Court: In rising to present the arguments of the Government in this case I have a deep sense of the responsibility that goes with that office. We are dealing, it is true, with old problems. Although there is little that I can hope to add to your knowledge of the cases, I would feel that I had failed if I did not convince you of the sincerity and the disinterestedness with which the Government has asked and with which it now presents its arguments in this case.

Since *Kansas* v. *Colorado* (206 U. S. 46), it has been settled that there are no unusual and sovereign powers in the Government of the United States over and beyond those delegated by the Constitution. Yet extraordinary conditions may call for extraordinary remedies. *Home Building & Loan Ass'n* v. *Blaisdell* (290 U. S. 398). The conditions that now confront the railroads and their employees in this country are not extraordinary in the sense that they have suddenly developed. They are extraordinary only when we look back 40, 30, or even 20 years, at the problems of the relationship of management to labor upon our great systems of transportation. The increasing complexity of the railroad system, due to integration and combinations, holding companies, and the increased number of employees, have been counterbalanced by a widespread organization of labor unions. The result

has been a seeming conflict between the interests of management and the interests of labor. This particular case is probably symptomatic of many cases which have been and will be before this Court.

The Railway Labor Act, as amended (44 Stat. 577, 48 Stat. 1185, U. S. C., title 48, secs. 151, et seq.), is, of course, based upon the commerce clause. It is attacked, first, on the ground that it is unconstitutional in its entirety because of its wide extent, and that it is impossible to separate the various provisions and applications of the act. Further, regardless of the constitutionality of the act as a whole, the petitioners question the enforceability under the act of particular provisions of the decree, and assert that if the act does undertake to make enforceable the provisions relating to collective bargaining and nondealing with certain employees, the act violates the fifth amendment.

In the presentation that has been made at the bar the greatest stress has been laid upon the latter point. I hope that I will also have an opportunity to say something in regard to the validity of the act as a whole and as to its separability, but at this moment I would like to take up the provisions of the decree and the question of their enforceability under the act.

Your Honors will find the decree on page 282 of the record. It is divided as to substance into three provisions. The first provision relates to collective bargaining. The second provision is a negative decree, prohibiting interference with the organization of labor unions and with the choice by these unions of their representatives.

I do not think that I go beyond the record and the briefs when I say that petitioners make no objection to this second provision of the decree. When I say that, I assume that we have determined that the act as a whole is constitutional, and I also assume that there is nothing in those provisions which denies due process of law. Apart from those questions, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548), is probably conclusive.

The third provision of the decree restrains the railroad from entering into any contract or agreement concerning rates of pay or working conditions affecting its mechanical department except with the respondent. This provision is, of course, in strong controversy.

We do not construe this provision of the decree to mean that the employer is restrained from contracting with individuals, but that it is restrained only from entering into agreements and undertakings which affect the whole of any particular crafts. That interpretation of the decree is supported by the last part of the opinion of the district judge (R. 278). A reading of that paragraph of his opinion will make it clear that in phrasing the decree he was thinking only of negotiations and agreements between representatives of groups of employees chosen for the purpose of entering into negotiations with the railroad company.

The accuracy of that interpretation is also made clear by the provisions of the petition (R. 29). Respondents prayed that the railroad be restrained—

> from entering into any contract concerning rules, rates of pay, or working conditions affecting the mechanical department employees of the Virginian Railway Co., with the mechanical department association of the Virginian Railway Co. or independent shop crafts association of the Virginian Railway Co., or any other association or "company union" so-called, as the representative of the said mechanical department employees, save only the complainant federation.

Petitioners make some point of the language of the decree which reads—

> are further enjoined and restrained of and from, directly or indirectly, entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees, save and except only with the complainant, System Federation No. 40 * * *.

Again, we regard that language as inapplicable to individual contracts with individual employees. It does not restrain the employer from giving consideration to seniority or to skill. When read with the petition and the opinion that accompanied the decree, it forbids only those agreements which cover an entire craft.

I come now to the enforceability of the prohibitions of the act. Probably no difficulty would arise were it not for the history of railroad labor legislation and two important decisions of this Court: *Pennsylvania R. R. Co.* v. *Railroad Labor Board* (261 U. S. 72), and *Pennsylvania Federation No. 90* v. *Pennsylvania R. R. Co.* (267 U. S. 203), both of which concerned the Railway Transportation Act of 1920. That act marked, as this Court said in the *New England Division Case* (261 U. S. 184), a change from a prohibitory attitude of the Government toward the railroads to an affirmative effort to help the roads and to help the conditions that might interfere with the continuity of transportation.

In considering section 301 of that act the Court did say that the railroads were not required to negotiate with their employees. However, in the first of the two cases it said that the Railroad Labor Board had the right to hold a hearing upon the conditions which had brought about the strike; and it further certainly implied that the provisions of section 307 of that act, which gave the Board the right to hear and render opinions upon disputes as to working conditions was within the power of Congress.

In the second case Chief Justice Taft again commented on section 301, and said that if there had not been language which made it clear that there was no intention of enforcing the obligation, it might well be held that section 301, in and of itself, stated an enforceable obligation on the part of the railroad company.

No other cases in the Court with which I am familiar have denied the enforceability of any provisions of the act. There is, of course, the *Texas & New Orleans case*, in which subdivision third of section 2 of the Railway Labor Act of 1926 was under consideration. The Court is probably fully familiar with the fact that section 2, first and second of the present act, which is the act of 1926 with the amendments of 1934, employs substantially the language of section 301 of the Transportation Act.

The Transportation Act had not been successful in bringing about collective bargaining or in removing interference with railroad labor organizations. As has been detailed here in Court, Congress, in the 1926 act, made some additions to section 301 in order to carry still further the voluntary plan which had been first undertaken in the Transportation Act of 1920. These changes appear in section 2, first, of the present act, in which, after saying that, "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions", Congress added, "and to settle all disputes."

The 1926 act was a rather complete reorganization of the scheme of prior acts. This Court in the *Texas case* pointed out that it provided for enforceable arbitration; not, of course, that railroads were compelled to arbitrate, but that if arbitration was entered into it could be enforced. The act also reorganized the adjustment boards and the boards of mediation, but it kept the principle of the extraordinary Board of Mediation that could be called when great problems of interference with transportation arose.

The language of subsection third, which was under consideration in the *Texas case*, closely followed the language of subsections first and second and of section 301. In other words, there was no more express language in subsection third which would lead the Court to conclude that that subsection was to be enforceable than there was in section 301.

Subsection third read:

> Representatives, for the purpose of this Act, shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Quite plainly, it was not in the language of this subsection that this Court found enforceability when it did not find enforceability in the language of section 301, now section 2, first and second.

The enforceability came, rather, from the whole plan, from the additions that had been made to the old plan, and from the growing realization that Congress must have intended, in setting up a voluntary plan, that it should at least have a chance to operate. The provision that the railroad should not interfere with the organization or the choice of representatives of its employees was said to be essential to the principle of noninterference.

In 1934 Congress gave further consideration to the operation of the Railway Labor Act. I do not think that there were any fundamental changes made. Subsection second was left as it had been, with minor variations. Section 2, fourth, sixth, and ninth, were strengthened. We have also to take into consideration section 6, which relates to the requirement that carriers give notice to their employees in case they intend to make any change in their agreements.

I would like to direct the Court's attention particularly to section 2, fourth, which is completely new. Insofar as it is important here, it reads:

> Employees shall have the right [I stress that word] to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act.

The word "right" is to be weighed with the word "duty" which appeared in section 301 and which is continued in section 2, sixth, which reads:

> In case of a dispute between a carrier or carriers, and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees within ten days after the receipt of notice of a desire on the part of either party to confer in respect of such dispute, to specify a time and place at which such conference shall be held * * *.

That language was not in the Transportation Act. It was in the language of the act of 1926.

Then there is the provision of section 6, of which I spoke a moment ago, requiring a 30-day notice of any intended change in agreements affecting working conditions. Section 6 works both ways, for either party must give notice. As a final clause showing the intention of Congress that these should be enforceable provisions, section 2, ninth, was added. That subsection required that if any dispute should arise between the employer and the employee as to the representatives of a craft or class, and that dispute should be submitted to the Mediation Board and be decided and a certificate be issued—

> Upon receipt of such certificate the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.

Counsel at the bar yesterday inadvertently stated that section 6 was not enforceable. Section 6, as we understand it, is enforceable. It is made enforceable not only by section 2, seventh, which provides that the employer shall proceed in accordance with section 6 when questions of agreements are under consideration, but also by section 2, tenth, which places a criminal penalty upon the violation of section 2, seventh, which, in turn, makes enforceable the provisions of section 6.

That there may be no misapprehension of the position of the Government, I would also call attention to another statement made at the bar yesterday by counsel for the petitioner—that the Government and respondent relied upon section 2, ninth, as the provision which made collective bargaining enforceable. Of course, we rely upon that subsection as evidence of the enforceability of collective bargaining, but as the Court will readily perceive from our brief, at page 54, we rely not only on section 2, ninth, but also upon all the language that I have referred to in my argument. We believe that the strongest argument is not to be drawn from the provisions of section 2, ninth, which is a clean-up section to take care of a particular situation, but rather from the entire plan. It is that plan as a whole that we earnestly press upon you as requiring a determination that the collective bargaining must be undertaken by the carrier.

It is true that the plan is still essentially and fundamentally voluntary. The mere fact that by agreement the parties may submit to arbitration which becomes binding after submission does not affect the theory of voluntary action. The submission of controversies to the Mediation Board or to the Board of Adjustment does not require that the railroads should carry out the decisions of those boards. Collective bargaining does not mean that an agreement must be reached.

Your Honors considered this phase of the case in the *Texas case;* you pointed out that for the success of a voluntary plan there must of necessity be certain sanctions as to the preliminary steps, and you enforced the sanction that forbade the railroad from interfering with the organization of its employees. We now urge that the same theory that made that sanction legally enforceable also makes these provisions legally enforceable.

Comment is made in the briefs that these provisions are evidently not intended to be enforceable, because no criminal penalty is added. Collective bargaining is new to our system of industry, new in the sense that there are not many cases undertaking to say what collective bargaining is, how it shall be carried out, what shall be its results. Both parties here approve of collective bargaining, but it is the question of enforceability that divides their minds. Certainly we can-

not undertake now to settle all the problems that arise through collective bargaining. Congress has taken a simple first step; a step that merely requires the employer to treat with his employees, to meet them in collective bargaining, and, I presume, to state frankly his position, and hear the employees' side.

If we are to make progress in our voluntary scheme, we need sanctions such as were applied against interference with organization in order to bring the employer and the employees together around a table to discuss questions of interest to them both. Surely, to ask that they take those steps by compulsion will not have any more effect in keeping them apart than if they never meet. We grant, of course, that either the employer or the employee may go into the conference determined to yield under no circumstances, and that if either lived up to that determination, enforced collective bargaining would be a futile thing; but we believe that men as a rule are not of minds that will not change. We believe that if this Court upholds the duty to bargain collectively, it will be accepted with good grace by employer and employee and will go far toward affording machinery for proper adjustment of differences between labor and management.

The fact that it is difficult to enforce collective bargaining seems to me no reason for denying that it is enforceable. Certainly its enforcement is no more difficult than the enforcement of a mandamus addressed to an officer to require him to perform a discretionary act. It may be that the judge or the Cabinet member ordered by the court to exercise his discretion will be irritated; but certainly there must be some process by which the exercise of discretion may be compelled. Of course, we have illustrations of that frequently.

I turn now from what might be called the affirmative provisions of the decree to the negative provision which forbids negotiations with any group other than those represented by the representatives chosen at this election. I wish first to point out that our interpretation of the provisions of this act requires that those negotiations should be exclusive; that is, that it is only the representative of the employees who has been chosen by the election of the employees that has the right to appear and negotiate in regard to arrangements affecting the entire craft or class which he represents.

The sections which lead us to that conclusion are much the same as those of which I have just spoken in regard to collective bargaining. Section 2, fourth, for instance [reading]:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * *.

This act differs from the Wagner Labor Relations Act, which specifically says that the chosen representative shall be the exclusive representative. Yet we think the necessary inference from this language of the statute is that these representatives of the employees are to be the exclusive representatives of the craft or class in the negotiation of contracts and agreements.

Section 2, seventh, to which I have referred in comments on the other phase of the decree, reads:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions * * *, except in the manner prescribed * * * in section 6 * * *.

We have commented on section 6 and section 2, ninth. And since section 2, seventh, requires a discussion with representatives of employees as prescribed in section 6, it is our position that that representation is an exclusive representation. Of course, that accords with the ordinary method of dealing in railroad matters. Practically, it is impossible to have different contracts with different groups of employees—to have representation of the majority and the minority, or of individuals—because, after all, an agreement is the object of the conference. Railroads would be at a great disadvantage in having different rates of pay for different classifications of employees. They may vary, of course, on account of age or seniority, but for the same individual in one job to be paid differently from another individual in an identical job is contrary, as I understand it, to the present operation of the railroad system.

There is another reason that makes it almost essential that this representation should be exclusive. That is the provision that in case of disputes between the employees themselves as to whom they will choose to represent them, there is to be an election by a secret ballot, so that all the employees at least have an opportunity to participate in that election. It may be that Your Honors will conclude that a majority of them must participate, and if so, there would be no way of knowing which employees had participated and which had chosen their representative.

Counsel who preceded me has referred to the fact that the last clause of the second paragraph of the decree may be supported on another theory, and that is that it was used not as an enforceable provision in the sense of an exclusive power given by the act, but in the sense of a means of prohibiting interference with the organization of employees. Of course, in this case the employer has interfered by undertaking to set up a second employee organization, which has been referred to as the association, in contradistinction to the Federation which is here before Your Honors.

What I have said up to now relates solely to the interpretation of the act. Counsel for petitioner controvert our position. Further, they say that if an act does require collective bargaining and does keep them from bargaining generally with other representatives of their employees, then it is unconstitutional under the fifth amendment, as a deprivation of their liberty and property without due process.

Since *American Steel Foundries* v. *Tri-City Council* (257 U. S. 184) and *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548) there has been no doubt as to the validity and the propriety and the right of employees to organize. Speaking first of the affirmative part of the decree requiring collective bargaining, we do not see that there is any deprivation of liberty or property by requiring merely negotiation and collective bargaining without a requirement of an ultimate conclusion or agreement. From the point of view of the petitioners, the contention must be that merely to require an employer to sit at the same table with his employees and to enter into business negotiations with persons with whom he does not care to is a deprivation of liberty or a deprivation of right of property that is forbidden by the Constitution of the United States.

Of course, the employer has a right to operate his business free of dictation. There is neither disposition to, nor authority or reason for, raising any question as to that right. But this Court has said

in the *Texas case* that there was another right that was equally entitled to the protection of the Constitution and the courts—the right of employees to organize and to select their representatives.

And so here we have another instance of two undoubted constitutional rights. The employer is entitled to operate his business in his own way, free of dictation either from the Government or from labor, and labor is entitled to organize and to have its representatives and to deal collectively, free of the dictation of the employer.

Those great clauses of the Constitution that protect the rights of the individual have always been held by this Court to lack the quality of absolute rights. In *Home Building & Loan Association* v. *Blaisdell* (290 U. S. 398) it was forcefully stated that under modern conditions, with the increase of industry and population, and with the changes of unionization and consolidation, the problems of the relation between the public good and the individual right must be weighed by the courts. The Chief Justice, speaking for the Court, there said that the increased use of the organization of society was necessary to protect the very basis of individual opportunity.

It may be that there has come a time when we need to shift our conceptions of the fundamental right of the individual or of the railroad corporation—not from the early views of what those rights are in theory, but to a realization that those rights are not to be exercised in a manner inimical to the general welfare.

In this case we have those conflicting interests. Does the fifth amendment prevent the Congress from infringing somewhat upon the absolute right to be perfectly free in the operation of your business and in your dealings with your employees in order to assure continuous operation of the railroad systems—a great public necessity—and to bring industrial peace to the country?

Your Honors in the *Blaisdell case* called attention to the fact that the very statement of the theory that the meaning which would have been placed upon the fifth amendment by the Founding Fathers is to control at this time carries its own refutation. The changing conditions that have occurred make very pertinent the oft-repeated statement from *McCulloch* v. *Maryland* (4 Wheat. 316), that we must never forget in the interpretation of our organic law that it is a constitution we are expounding—a constitution intended to endure for ages, and consequently to be adapted to the various crises of human affairs.

Only recently, in *Nebbia* v. *New York* (291 U. S. 502), this Court reiterated the well-known statement in regard to the fifth amendment. If I may quote just a sentence, the decision, after speaking of the fifth and the fourteenth amendments, said (p. 525):

> They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The books are full of interferences with the private rights of individuals. *Bunting* v. *Oregon* (243 U. S. 426), *Muller* v. *Oregon* (208 U. S. 412), *Holden* v. *Hardy* (169 U. S. 366), all the workmen's compensation cases, all allow some infringement of the personal liberty of individuals in order that the liberty which had been guaranteed to the individual might be available, not only for the particular individual, but for all of the great company that make up this Nation.

You said that the function of the courts in the application of the fifth and fourteenth amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exercise of constitutional authority or whether it appeared to be arbitrary and discriminatory.

A curious instance of the advantages of negotiations with employees comes up in this very record, page 147, where the assistant to the president charged with labor relations said on the stand that he had never known that the employees of the road desired to negotiate with him in regard to certain hours that they wished to have allowed for their labor. He would not meet with them. They had attempted to get in touch with him.

Counsel who preceded me has spoken of the good results that have flown from railroad labor organization and from the act of 1926. They have been successful, and the slight interference with the personal liberty of the railroad management in asking that they do not interfere with the organization of their employees, that they meet them in collective bargaining, and that they not negotiate with others than the properly chosen representatives of their various crafts seems a very minimum that they could be asked to relinquish in order that we may bring about industrial peace.

It is said that *Carter* v. *Carter Coal Co.* (298 U. S. 238) forbids the Court reaching a conclusion that this act is not in accord with the fifth amendment. It is true that you took into consideration in the *Carter case* the provisions of collective bargaining, but our contention is that they appeared in that case only incidentally. The fundamental purpose of the statute in the *Carter case* was the settlement of wages and hours and allotments of coal and prices through negotiations which were mandatory on the whole industry when agreed to by a certain proportion of the industry, whether employer or employee. It was that interference with rights in the wages and hour provisions that led you to make comments in regard to collective bargaining. There were collective bargaining provisions there, but, as will be seen by looking at the sections of the act in which they were stated, they were aimed at the greater and fundamental provisions of the Bituminous Coal Act, and were to be used to bring about the wage and hour provisions and the allocation of coal that Your Honors found to be not only beyond the interstate commerce clause but also an arbitary denial of due process.

May I inquire, Your Honor, as to what time I have left?

The CHIEF JUSTICE. You have taken an hour, just an hour of your time.

Mr. REED. Thank you very much.

I now pass to the question of the constitutionality of the act as a whole. It goes without saying that this act covers all railroad employees from the minor official down. That is made clear by section 1, fifth. It defines "employee" in the terms of the regulations of the Interstate Commerce Commission. We have referred to the provisions of those regulations of the Commission in our brief at page 31. It includes not only the employees of the railroads themselves, but it includes employees of their subsidiaries when they are directly owned or controlled by the railroads. The petitioner contends that this makes the act invalid. The circuit court of appeals, of course, held to the contrary of petitioners' contention, both on the ground that all

employees were within the limits of the power of Congress, and also on the ground of separability.

There is no doubt that Congress has power to legislate not only for the employees engaged in interstate transportation but also for the employees who directly affect interstate transportation. There is no doubt that there exists the power of Congress to carry its regulation beyond those things that are directly concerned in the movement of commerce not only so far as transportation is concerned, but so far as the entire interstate commerce clause is concerned. Since the *Minnesota Rate cases* (230 U. S. 352), *Florida* v. *United States* (282 U. S. 194), and the *Shreveport case* (234 U. S. 342), there has never been any real question in regard to that.

Your Honors had before you in *Southern Ry. Co.* v. *United States* (222 U. S. 20) the Safety Appliance Act, and of course held it valid, even when it affected operations of the railroad which were intrastate. You also had in *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission* (221 U. S. 612) the Hours of Labor Act of 1907, and also upheld its validity upon a broad basis. In both of those cases it was perfectly clear that Congress had power to reach into railroad labor situations that were beyond actual movement in interstate commerce.

Justice SUTHERLAND. Can you tell me in a few words just what these shop employees do?

Mr. REED. I think so, sir. "Shop employees" is a term that covers all the mechanical employees of the railroad, as I understand it. The issue here, however, is as to what are called back-shop employees. I take it that no question would arise as to shop employees who make running repairs upon the trains as they move upon the tracks. The point is made against the back-shop employees, who are electricians, blacksmiths, carpenters, and artisans of that class and craft and type.

Justice SUTHERLAND. What do they do for the railroad company?

Mr. REED. They do two things, specifically: They repair engines and cars withdrawn from the transportation service for repairs.

Justice SUTHERLAND. That is, temporarily withdrawn, and then put back in the service?

Mr. REED. Yes; and I think it is proper here to say that those withdrawals are for a long time, meaning that the record shows that the average withdrawal is from 100 to 110 days in engine and car repairs.

Justice SUTHERLAND. But with the ultimate purpose of putting them back into the service?

Mr. REED. Correct. The other duty that they have is what is called store work. They make a variety of small machinery, nuts, and bolts and all the different supplies that the railroad may need up and down its tracks. The back-shop work is of that type, as I understand it, sir.

Justice SUTHERLAND. But what they do goes back into the use of the company in their operations?

Mr. REED. Yes. They are not manufacturing for other railroads or for other uses than that of the railroad itself in its transportation service.

The CHIEF JUSTICE. I suppose they manufacture for their own use whatever they find convenient to manufacture in that way, instead of buying from outside?

Mr. REED. In most cases, sir.

The CHIEF JUSTICE. And does the railroad depend upon what is thus manufactured for its own use, for its supplies that are necessary?

Mr. REED. Well, I don't know that I could answer that question, sir, except in this way: that they do use the things that they get. But so far as the articles that are manufactured, so far as the record shows they are minor articles that could be bought any place.

The CHIEF JUSTICE. Yes; but what I mean is, having an organized system——

Mr. REED. They have an organized system.

The CHIEF JUSTICE. Whereby supplies of this character are furnished by the railroad from that source of supply, and they expect their workmen to make the articles they need for current use. Isn't that it?

Mr. REED. That is it precisely, and it is brought out even more clearly when you consider the work of those employees upon engines and cars. It is essential to the railroad system that such work be carried on under their own control, so that they can bring out the engine that they want, put it at work, rush the work on one, and defer the work on the ones that are not needed.

Justice SUTHERLAND. The particular thing I wanted to know, and perhaps you have already stated—I understand you now to say that nothing is made for the trade, nothing is made to be sold?

Mr. REED. Nothing is made to be sold, sir.

Justice SUTHERLAND. Nothing is made to be furnished some other independent corporation?

Mr. REED. Absolutely nothing, so far as the record shows, and so far as I know, either.

Now, Your Honors will see on page 25 a table that points out the excessive cost of having this repair work done at other places. There have been instances of back-shop men who have gone out on a strike, and that table is the result of an investigation by the Interstate Commerce Commission of the cost of such back-shop strikes. The difference in cost is almost inconceivable between the repair of your articles in outside factories and the repair in your own shops. These back-shop employees, it seems to us, come into such a direct contact with the railroad that it is constitutionally possible for the Congress to regulate their relations exactly as they would regulate the relations of any engineman or fireman or other person engaged in the transportation facilities themselves.

Your Honor asked about the work of the back-shop men—and I think I have answered that in full—but this seems to me a very interesting sidelight upon their relation to the railroad. The same craft that operates on the running repairs of the road operates in the back shop. The same apprentices work part of the time on running repairs and part of the time in the back shop. The very agreement that this petitioner has covers all classes, all crafts, whether they are engaged in back shop, or whether they are on the railroad. They have machinists and electricians, of course, that are used on the railroad itself, but the same agreement as to wages and hours and seniority and apprentices that cover the back-shop employee, cover those that are on the railroad itself. That is a perfect example of the close relationship and the direct effect of these back-shop employees upon railroad operation. Moreover, as Your Honor said, these cars and

engines are withdrawn only for repairs, and are put back upon the same railroad as promptly as possible.

But, as I understand the contention of the petitioner, it goes further than that. It goes to the point of contending that because this act goes ever further than the back-shop employees and takes up employees of the railroad whose effect might not be so direct upon transportation, that that alone makes the act unconstitutional. There is, of course, authority for that statement. The first Employers' Liability Act was held unconstitutional in *The Employers' Liability cases* (207 U. S. 463), as I understand it, for that very reason. It was not that Congress lacked the authority to regulate the employment relations of those who were engaged in transportation, but merely that Congress had gone beyond those who were engaged in transportation and had made the statute applicable to all employees of railroads. Of course, there is no doubt in regard to the Congress' power as to those engaged in transportation, because you held that constitutional in the *Second Employers' Liability cases* (223 U. S. 1).

It is not our contention that the first *Employers' Liability cases* were erroneously decided. We are not arguing that, of course, to the Court. We are saying that the conditions and the aims of the two acts are so fundamentally different that while the first Employers' Liability Act was unconstitutional, the present act, although its language is admittedly practically as broad, is constitutional as a whole. And the point that we make is this: that insofar as the right of Congress to protect the employee from dangers and injuries is concerned, the conclusion might well be reached that the power of Congress did not extend to the protection of the stenographer and the elevator operator and station man. But in this case the power of Congress is being exercised from a different point of view—from the point of view of the adjustment of labor relations, and, so far as labor relations are concerned, the effect of difficulties among employees not engaged in transportation is just as direct and just as dangerous to the continuity of the transportation system of the country, whether it arises from shopmen or from elevator operators or from the engineers and firemen themselves.

There is a striking instance of that fact in this case. In the railway shopmen's strike of 1920 this very petitioner sought an injunction to keep not only shopmen but clerks and employees of the railroad in various nontransportation activities from interfering with the operation of the railroad. It is our contention that this act, when approached from that point of view, shows the direct effect upon commerce of all railroad employees insofar as labor situations are concerned.

But we say that, if we are not correct as to that, certainly the provisions of the act are separable. We would call attention to the fact that there was no separability clause in the first Employers' Liability Act, nor in the *Trademark cases* (100 U. S. 82). Here we do have a separability clause, not only with respect to the separability of the various clauses of the act, but also with respect to its application to any condition.

We think that the rule so tersely and accurately stated in the *Carter case* is applicable here: That, so far as a separability clause is concerned, it is not an inexorable command but merely a presumption, and that the fundamental test is the intent of Congress—what

would it have done if it had thought that some of the railroad employees who are not engaged in interstate commerce would be omitted from the provisions of this act?

In *Railway Labor Board* v. *Alton R. Co.* (295 U. S. 330), we have very accurate statistics in regard to that, showing over 1,100,000 railroad employees, of whom only some 211,000 are not engaged in strictly interstate commerce. Many even of those 211,000 are of the class of the back-shop employees, officers of the road, or clerks, and it was indicated in that case, at least in the opinion of the Chief Justice, that these people were not so far removed from interstate commerce as to be beyond the power of Congress. Probably, then, there are only some 30,000 to 40,000 railroad employees out of many more than a million who would be beyond what you might call those who directly affect interstate commerce.

For these reasons we feel, Your Honor, that the contention in regard to the unconstitutionality of the act must fail: First, because all whom it covers are closely related to commerce; and second, because, if you should reach another conclusion, certainly the provisions are separable.

That covers the parts of the case to which I wish to call Your Honors' attention. I might add that the negative obligation in the decree forbids a contract which covers any part as well as the whole of a craft or class. This interpretation of the decree and the statute is stated in the footnote in our brief at page 51.

I am grateful for the opportunity to have presented the case for the Government.

ORAL ARGUMENT IN REBUTTAL ON BEHALF OF THE PETITIONER

Mr. HALL. May it please the Court: We are dealing with a decree here that can be best considered——

Justice SUTHERLAND. I am sorry, but I don't hear you.

Mr. HALL. If divided into three sections. One of the sections requires the railway company to meet and treat with the representatives of the federation, and in addition to that there is a prohibitory or restraining clause attached to the decree which provides that the railway company cannot deal with anybody other than the representatives of the federation or the representative certified by the Board.

Now, those two clauses of the decree must be considered together in their constitutional aspect. We have certain other provisions of the decree which prohibit the company from influencing, interfering with, or coercing the employees in connection with their labor relations. We have another clause of the decree which prohibits the railway company from organizing, attempting to organize, fostering, or promoting labor organizations.

Now, I shall consider first those two last-mentioned prohibitory clauses of the decree, because I think the Court has gotten a very erroneous idea of the situation from the facts that have been stated here in connection with those provisions. If we have been interfering, influencing, or coercing these parties, then unquestionably, under the *Texas case*, we can be enjoined from doing it. If we have organized, promoted, and fostered these labor organizations, as it is claimed,

why that amounts to an interference and we can properly be enjoined from doing that.

Now, I approach the discussion of that question by simply stating to the Court a few facts, especially, first, in connection with these two organizations that the court below found that we organized, fostered, and controlled.

Take first the mechanical department association, the one that was organized in 1922. If the Court will refer to page 133 of the record, the Court will find there a resolution of the Railroad Board under the Transportation Act of 1920 which called upon and requested the railroad companies whose employees had quit in that 1922 strike to have their employees organize themselves so that they could appear before the Board in the settlement of controversies.

All the railroad company did in connection with that organization was to pass the information which had been furnished it by the Board on to the employees. They got together and organized themselves into an association. There is absolutely no proof here that the railway company had anything to do with the organization, and if the Court will look to page 231 of the record, you will find that the question of a contract with this organization among the men was requested by their general chairman. They were advised that the organization would be accepted, and a tentative form of contract was sent to them.

Now, there is some criticism made here of sending them the form of contract. Well, the record discloses that that contract was drawn in tentative form based largely upon the contract that previously existed with the federation before the federation strike of 1922. But that contract was not accepted and run down their throats, as would be indicated here. But the representatives of the railroad companies and the chairmen of the six crafts met in the city of Roanoke away from the offices of the railroad company and spent 4 or 5 days going over that contract and working out its different provisions, and finally it was signed by all of these chairmen and by the representatives of the railroad company.

Justice BRANDEIS. What was the date of that?

Mr. HALL. That was in October 1922 that the contract was signed.

Now, that contract, regardless of what criticism is made here, the federation expressed its willingness to take over, and the federation's contract that they presented desiring to take over that contract did not provide for any modification or anything of that kind. It is true that they tried to ring in several classes of employees that did not belong to these crafts and who were not concerned with the election; I mean not on the eligible list and did not vote in the election, but they were willing to take that contract over as it stood.

Following that the railway company dealt with the representatives of this association during 12 years. They had elections every 2 years. They had an adjustment board that adjusted the disputes between them, and the federation's own witnesses here say that that board did function; that disputes were heard and adjusted; that sometimes they got satisfaction or got what they claimed, and sometimes they did not; and the only instance of a failure to adjust a dispute is in regard to the 40-hour provision that they were to have each week. In the hard times the shops all over the country were cut down.

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They did not have the appropriations and they could not keep the men all employed, and of course it was necessary to do one of two things: It was necessary either to cut down the time that those shops worked or cut down the number of men employed. The defendant—I mean the railway company—adopted the plan of cutting down the time so as not to deprive anybody of employment.

Now, when that question came up the chairmen of these different crafts met with the superintendent of motive power. They discussed the question, and the superintendent of motive power explained to them his limited appropriation; that if they insisted on the 40 hours it would be necessary to cut off a lot of the men, and that that was something that he wanted to avoid.

They were not satisfied with that, but the record actually showed that they circulated a petition asking for the 40 hours and that they actually communicated with Mr. Eastman, the coordinator of the railroads under the Emergency Transportation Act of 1933, before that petition was withdrawn. Upon advice from him that they could not force an issue of that kind the petition was withdrawn.

Now, that is one of the complaints that they try to make much of here.

We have never denied, if the Court please, that the railway company did contribute certain amounts to the expenses of this adjustment board. The adjustment board met to consider these grievances, and the railway company paid the expenses of the labor members of the board in attending these meetings, which actually amounted to something less than a hundred dollars a year.

That was stopped as soon as the law prohibited it. It was perfectly legal to do that at the time it was done.

They allowed the men to send out their ballots through train mail in holding their elections, but the record here expressly shows that they used no effort to influence or coerce those men in connection with their selection of representatives and the voting. The federation witnesses testify to that, that no influence or coercion was used upon them in connection with the selection of their officers who were to represent them in their dealings with the company.

Justice BRANDEIS. How far are your statements that you have just made inconsistent with the findings of the court.

Mr. HALL. With the findings of the court?

Justice BRANDEIS. Yes.

Mr. HALL. They are inconsistent with the findings of the court to the extent that the court found that we organized, fostered, controlled, and dominated this association. There is a similar finding in connection with the independent shop crafts association. There is absolutely—and I make this statement advisedly—there is absolutely not any testimony in the record to show that the railway company had anything whatever to do with the organization of the independent, the new company. On the contrary, the record absolutely shows by positive testimony that the railway company had nothing to do with the organization, that it had not recognized them, that it had not treated with them, and that it had had no relations whatever with that independent association.

Justice BRANDEIS. You say that the findings of the court are without any evidence to support?

Mr. HALL. Without any evidence to support. The findings of the court as to the independent are absolutely without evidence to support, and the findings as to the association, the one organized in 1922, are without evidence to support, unless the statements that I have made in connection with the organization of that association consist of support of the organization.

Now, there are two other things that all of these inferences are drawn from. One is the testimony of a man named Mazingo as to Forbes, a car-repair foreman, having circulated a petition and having told the men something about voting in the election, that explained the election ballot to them.

Well, the court has found that testimony was controverted. The court has found in favor of the testimony of Mazingo and that these things were done. We do not question that finding.

Also in the case of Nevins, one witness testified that Nevins, a master mechanic at Victoria, had influenced him in his voting and kept him from voting for the federation by telling him that if the federation won in the election the shops would be closed and that he would have no job. Nevins denies that and explains it, but there the finding is against us, and this Court, of course, will accept the finding of the court below.

But those findings were in the face of the fact that these men were without authority to make any such statements, and in fact they were acting against authority, because they had been expressly instructed in the bulletin, one of the bulletins of which so much complaint is made here, on January 20, 1934, at record page 180, that they had nothing to do with labor relations and that they should not try to influence or coerce the men at all in connection with their labor relations.

Justice BRANDEIS. What did the court say about the testimony to that effect?

Mr. HALL. What did the court say?

Justice BRANDEIS. Yes.

Mr. HALL. The court found that these officers—I mean that these employees of the company, the master mechanic and the car foreman, had exercised undue influence.

Justice BRANDEIS. What did they say as to the evidence that their exercise of that undue influence was directly contrary to instruction?

Mr. HALL. Yes.

Justice BRANDEIS. I say, what did the court say?

Mr. HALL. The court did not say anything—did not say anything; just said that the Norris-LaGuardia Act in the respects claimed did not apply to this situation. But we relied on the Norris-LaGuardia Act and on principles of law that a principal is not bound by the acts and conduct of an agent unless they have been authorized, and especially when they have been actually prohibited.

Now, there are two other things in connection with that undue influence and interference, and one is that bulletin of January 20, 1934, which I have just referred the Court to on page 180 of the record. That is regarded as an improper and an undue influence.

Well now, the history of that bulletin is, as it appears in this record, that the federation was—I suppose that the federation was making its efforts to organize the shop employees all over the country, and

the eastern coordinating committee of the eastern railroads established under the 1933 Railway Act found that this misrepresentation had gone to such an extent that they recommended sending out to the carriers in the eastern division a bulletin identical with this one, if not identical, substantially in the same form as this bulletin, in order to apprise the representatives—I mean the mechanical department employees or laborers working for the railroad—that these misrepresentations were being made and that the so-called company union was not outlawed or prohibited by any existing law.

Then the other statement that we come to is the one commonly referred to as the Sasser statement.

The CHIEF JUSTICE. We will hear you after recess.

(Accordingly, at 2 p. m., a recess was taken until 2:30 p. m. of the same day.)

PROCEEDINGS AFTER RECESS

(The recess having expired, the oral argument was resumed at 2:30 p. m.)

ORAL ARGUMENT IN REBUTTAL ON BEHALF OF PETITIONER—Resumed

Mr. HALL. I was discussing the bulletin of January 20 and the Sasser statement, for both of which the railway company assumes full responsibility. If there is any infringement of the law in connection with the issue in that bulletin or the Sasser statement, why then we are amenable to the charge of undue influence, coercion, and interference.

I want to read for the benefit of the Court——

Justice BUTLER. Will you try to speak a little louder, Mr. Hall?

Mr. HALL. I say I want to read for the benefit of the Court——

Justice BUTLER. Yes; but I meant generally.

Mr. HALL. That bulletin of January 30, 1934, is on page 189 of the record [reading]:

> Reports have and are now being widely circulated to the effect that the law or the Federal Coordinator of Transportation has outlawed labor organizations or associations of employees whose membership and representatives are confined to the employees of a single raliroad company or system. Such reports are without foundation or justification because such organizations are not outlawed by the statute.
>
> All the labor organizations and associations at this time representing employees in their dealings with this company are duly designated and authorized to represent employees in accordance with the requirements of the law.
>
> Federal statutes provide that all employees are free to join or not to join any labor organization or association and will not be penalized, disciplined, or prejudiced in any way by this company.
>
> "All employees have the right, without interference, influence, or coercion, to designate their own representatives by such means of collective action as they may see fit."

Note this particularly [reading]:

> No person, whether an officer or employee of this company, or one not in the service has the right to influence, interfere with, or coerce any employee in his choice to continue or to surrender his connection with, or to join or not to join any such organization or association.

Signed "James V. Sasser, superintendent of motive power."

The Court will note not only the occasion of this bulletin, on account of these widely circulated reports, but it will also note the prohibition

in that bulletin of the officers using any influence or in any way interfering with the free choice of representatives by the employees.

Now, as to the Sasser statement, that is found on page 197 of the record. It is rather long, and I shall of course not attempt to read it, but our contention is in respect to that statement that it was simply a statement of facts and conditions that existed; that it was fully justified by the information which brought about its issue as to the circulation of these reports referred to in the bulletin, and in order to give the men information as to these matters in connection with the active effort on the part of outside organizers of the Federation of Labor to come in and organize them into that association.

The circuit court of appeals said in connection with that that it was not called upon to decide whether that statement alone would be sufficient evidence of influence or coercion; I mean the Sasser statement. The intimation is very strong, I think, that the circuit court of appeals did not think that that statement alone would be the exercise of undue influence.

The court said, couple that with these other things that I have mentioned, the bulletin of January 20, the conduct of these two employees, the master mechanic, Nevins, and the car foreman, Forbes, and coupled together they did constitute undue influence. Well now, there has been some criticism here of the fact that the General Solicitor was called in to pass judgment on that Sasser statement, on the legality of it. Very naturally, a statement of that kind, issued in view of the Federal statutes that were in existence, would be submitted to the General Solicitor to get his view as to the legality of it.

Similar statements, as the record shows, were issued by other railroads where this organization campaign was being conducted.

That statement was drawn and passed upon in the light of what the Chief Justice had to say in the *Texas case* in defining what constituted undue influence, interference, and coercion. He likened them to fraud and duress and summed it all up by saying that the influence that was prohibited must be of such a character as would override the will of the employee.

The CHIEF JUSTICE. Or corrupt the judgment?

Mr. HALL. What did you say?

The CHIEF JUSTICE. Or corrupt the judgment?

Mr. HALL. Or corrupt his judgment, yes; override his will or corrupt his judgment.

In other words, it did not prohibit the normal relations between employers and employees, and in the circuit court the counsel for the Federation even went to the extent of saying in the oral argument that it did not make any difference what kind of misrepresentations or misstatements of fact were circulated among the employees, the railway company under the prohibitions of the 1934 act was prohibited from contradicting those misrepresentations and setting the men straight.

When we consider those two statements in the light of the provisions of this Norris-LaGuardia Act, why they are certainly not prohibited. That act contemplates that it is not an offense to give publicity to the facts in connection with a labor dispute, and these statements both give publicity to the facts. Although these gentlemen have made a great complaint about these statements, they have not seen fit to contradict or even impinge any fact that is stated in

them. They must be facts; otherwise they would have to be contradicted and controverted in this case.

Now the other provision of the injunction act applies to the statement of these two men Nevins and Forbes. They were not only prohibited by this bulletin and by the Sasser statement from influencing or attempting to coerce the men in any way, but their acts were not authorized and they were not ratified, and under the provisions of that injunction act it must appear that there was either an authorization or a ratification before the company can be held liable for acts of this kind.

Now, I pass on to the other branch of the case, the injunction, which our friends the Government try to divide into an affirmative and a negative injunction, the affirmative part of it directing us to meet and treat with the representatives of the Federation, and the negative part of it prohibiting us from meeting with anybody else.

Now, of course, in effect those two provisions must be coupled together, and as to whether or not the railway company is denied its liberty or equality of right in entering into contracts must be considered in the light of those provisions of the injunction order. I think the Federation brief rather facetiously remarks along that line that it is like leading a horse to water but not being able to make him drink. Well, if you lead him to water and he refuses to drink and you don't let him get water from any other source, I don't know of anything that would be more coercive or more calculated to override the will and coerce you to do something that you did not want to do.

I have no quarrel with our friends on the other side about trying to limit the application of this part of the injunction order to group action rather than individual action. I will say right here in passing, however, that the provisions of that prohibitive section of the decree are broad enough to prohibit the making of an individual contract. We cannot make any contract. We cannot change any rule or working condition that applies to an individual worker, without transgressing that provision of the decree.

But suppose, for the sake of the argument, we say it applies only to group action. Here, as a most vital and forceful illustration of the effect of that proposition, is the fact that we are prohibited from making any contract with the group of carmen who are held not to be bound by this election and the representatives chosen in the election. But suppose we take the proposition generally that it inhibits only group action. Is not the necessary effect of that an inhibition against the right of the individual or corporation to make a contract? If it interferes only with group action, isn't it directly in the teeth of the fifth amendment as it has been interpreted by the courts in cases of this character? It destroys the liberty of contract and puts you in a position where you are not free to contract with whom you please and on what terms you please.

They also make the contention that times have changed, that things that were considered beyond the power of Congress under changed conditions have become subject to that power. Well, all I need say in that connection is that, in the interpretation that has been placed on the fifth amendment by this Court in a line of cases, times have not changed so as to take away from the individual the right and liberty to make contracts on equal terms.

They say that the act is coercive. We will admit for the sake of the argument that it is coercive. It is coercive on absolutely unequal terms. You cannot read this amendment without being impressed by the fact that the rights of the railway company as previously interpreted by this Court have been restricted, have been disregarded; but you find no restrictive or coercive conditions as far as railroads are concerned.

When we come to consider the constitutionality of that act, the Court will find that throughout the briefs of both the Federation and the Government the *Texas case* is relied upon as settling the constitutionality of the act. It is practically the only authority that is relied upon, except probably something that may have been said in the dissenting opinion or something that was said and not controverted in the opinion of the court.

Now, that *Texas case*—I should not take up the time of the Court to make any particular reference to it if it were not for the fact that it is solely, practically solely, relied on as settling the constitutional question in this case and of overruling the previous decisions of this Court.

Now, what was that case about? I wish I had time to go a little more into the background. In that case this railroad company had been dealing with the union, the brotherhood. It had been attending their conferences and meeting with them and negotiating with them. There was a case actually pending before the Railroad Labor Board at the time, and the association or so-called company union was not in existence. The company conceived the scheme of circumventing any dealings with the brotherhood by organizing a company union and actively participating in the organization. It sent its men out to promote the organization and paid them for their services and all that sort of thing. And suit was brought to prevent that interference under section 2, third, of the 1926 act. In the lower court there was an injunction restraining the company from conducting itself in that way and organizing this company union and discharging men and influencing the men contrary to the provisions of that section.

That did not stop the railroad company. They went ahead, and on a contempt citation they were fined or—not fined, but placed under certain conditions—in order to purge themselves of the contempt of the court's order. There were conditions that were imposed. The railroad company appealed. The Court in that case, in the very outset, says that the circuit court did not go beyond its power in imposing these conditions on the company in order to purge itself from the contempt that had been committed, and those conditions were imposed solely on that ground, requiring them to reinstate men and to reestablish the company union.

Now, we come to the question of the constitutionality of this act under the Texas decision. Right in the outset it is stated that this suit was brought—stated by the Court—

> to obtain an injunction restraining the defendants from interfering with, influencing or coercing the clerical employees of the railroad company in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926.

That was the purpose of the suit, as stated by the Court.

Now, when the Court comes to define the issue that was submitted to the Court in that case, it is said that "The bill of complaint invoked

subdivision third of section 2 of the Railway Labor Act, which provides as follows:" and then quotes subdivision third of the Railway Labor Act containing the prohibition against influence and coercion, the same as it is now, except the last sentence to section 2, third, has been added by the 1934 act.

Then what does the Court say, after quoting that section?

The CHIEF JUSTICE. We will have to stop you at this point. Your time has expired. We will take your brief in the case, to which you refer, and examine it.

(Whereupon, at 2:55 p. m., oral arguments in this cause were concluded.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 365

THE ASSOCIATED PRESS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORAL ARGUMENT

WASHINGTON, D. C.,
Tuesday, February 9, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 2:55 p. m.

Appearances:

On behalf of the petitioner: Mr. John W. Davis, Mr. William C. Cannon, Mr. Harold W. Bissell, Mr. Edwin F. Blair.

On behalf of the respondent: Hon. Stanley Reed, Solicitor General of the United States; Mr. Charles E. Wyzanski, Jr., special assistant to the Attorney General; Mr. Charles Fahy, general counsel, National Labor Relations Board.

The CHIEF JUSTICE. No. 365, the Associated Press against the National Labor Relations Board.

Mr. ERNST. If the Court please, I am the attorney for the American Newspaper Guild. We have filed briefs as amicus curiae. My client is the real party at interest, sole beneficiary. I made an application to the Clerk's office for time to argue to the maximum amount of 20 minutes. I talked the matter over with Mr. Reed, and Mr. Reed will make a statement in regard to his giving up the time or the time coming from elsewhere.

The CHIEF JUSTICE. I may say now, Mr. Ernst, that we have made a very liberal allowance of time here. We have allowed 2½ hours to the respondent, the National Labor Relations Board, and we have received your brief, which we shall consider, and if you can obtain a concession of any of the Government's time that we have allowed, we shall be pleased to hear you orally, but we cannot extend the time on your side of the case.

Mr. REED. May it please the Court, this matter has been under consideration by the Government for some time. There have been other requests for time to represent various labor organizations. The Government has felt that, being impartial in this matter, we

could not grant time to any party. Of course, they would not appear for the Government, but it would be speaking on the Government's time. Naturally, if the Court would desire to hear Mr. Ernst and would indicate that to us, we would be very glad to give such time as the Court shall say.

The CHIEF JUSTICE. We must allow you to be the judge of the disposition of the time allowed to the Government.

Mr. REED. Then I must decline to relinquish the time, unless the Court desires it.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. DAVIS. If the Court please, this case is here on certiorari to the United States Circuit Court of Appeals for the Second Circuit. The only question involved, so far as we know and believe, is the constitutionality of the National Labor Relations Act of July 5, 1935.

The history of the case lies in short compass. On the 18th day of October 1935 the Associated Press discharged one Morris Watson, who was one of its editorial employees in its New York office. As such an editorial employee, his duties consisted in reporting the news when he was sent out for that purpose, and writing the news, and rewriting the news which came in from other reporters to the New York office of the Associated Press from those with whom it had an exchange of news, in selecting the news which was to be transmitted to the members of the Associated Press for publication by them, and on occasion in "killing" the news when it was received, as being of no substantial value, every editor having on his desk a lethal instrument known as a "kill hook" on which would be deposited, in mortuary fashion, any news which, according to his judgment, did not possess sufficient public interest to form a part of the news dispatched to any section of the country.

He was discharged. He had been in the employ of the Associated Press for 7 years, first as a reporter in their Chicago office, and then in the New York office as a reporter and an inside editor. According to his own statement, he preferred reportorial duties, because they better suited his active and energetic temperament, and he showed himself quite reluctant to be tied down to an editorial desk, but his duties were of both characters.

He had been since 1933 an active member of the American Newspaper Guild, which is a labor organization composed of editorial and reportorial servants in the newspaper world. In fact, he had been one of the organizers of the unit of the guild in the office of the Associated Press and notoriously active in its enterprises. In the good days of the N. R. A. he appeared repeatedly before the code authorities at Washington in its behalf and urged, both before them and in the public prints, a compulsory code for the Associated Press, his employer.

His discharge coincided with the receipt of a demand from the American Newspaper Guild for collective bargaining. Demand was served upon the general manager of the Associated Press in behalf of the American Newspaper Guild, demanding the right to be recognized for purposes of collective bargaining with reference to its editorial employees.

When he was discharged, according to Watson's own statement, the terms of his discharge from his immediate superior, Kendrick,

who was the editorial supervisor, were "because we are dissatisfied with your work, you are dissatisfied with us, and I am convinced you will be happier elsewhere."

When the testimony was taken before the examiner who was appointed by the Board, as I shall state in a moment, files of the Associated Press were read by the regional director of the National Labor Relations Board, who reported the file with reference to this particular employee contained a recommendation for his discharge by his superior, Kendrick, upon five different grounds, and his discharge was authorized by his ultimate superior, the general manager of the Associated Press, Mr. Cooper, in writing, endorsed upon that recommendation in this language: "But solely on grounds of his work not being on a basis for which he had shown capability."

The report of the examiner to the Board called attention to the fact that in that sentence the words "but" and "solely" were underscored, by way of emphasis, by the general manager of the Associated Press.

On the 7th day of November next following his discharge the American Newspaper Guild filed charges with the National Labor Relations Board asserting that his discharge was in violation of rights conferred upon him by the National Labor Relations Act; that it was an attempt to interfere with, influence, and coerce him in his rights to organization and collective bargaining; and that it constituted an unfair labor practice under sub-sections 1 and 3 of section 8 of the act.

Complaint was served upon the Associated Press, and it answered in writing denying that the discharge of Watson was for the reason stated in the complaint, and asserted, upon the same grounds which we shall urge here, that the National Labor Relations Board or its regional division had no jurisdiction or authority in the premises, by reason of the fact that the National Labor Relations Act was obnoxious to the Constitution of the United States.

We asserted that unconstitutionality under the tenth amendment in this answer, on the ground that the act undertook to deal with subject matter not committed to the Congress under the commerce clause of the Constitution; second, that the act was invalid because it violated the fifth amendment, in that it deprived the Associated Press of rights and liberties without due process; and finally, that the act was invalid under the first amendment, in that it was a direct and palpable invasion of the freedom of the press.

The answer and the complaint were then assigned to a trial examiner, and before that trial examiner we moved to dismiss the entire proceeding upon the same constitutional grounds that were asserted in our answer. The motion was overruled, and the Associated Press thereupon withdrew from the hearing. It did, at the request of the Board and examiner, supply its assistant general manager as a witness, that he might fully state to the examiner and for the purposes of the record the nature and character of the Associated Press, its business, its method of conduct, and the relations which Morris Watson, as one of its editorial employes, sustained to it.

Watson himself was heard. One of his coemployees, who was a member of the American Newspaper Guild, was heard.

Thereupon the examiner reported that in his judgment he had been discharged in order to discourage membership in the American Newspaper Guild; that he had been discriminated against by reason of that membership; that it constituted an interference with his

rights under the act; and he recommended that we be required to reinstate him with pay during the period of his absence.

The report went to the Board; and the Board, after consideration, confirmed the report. It entered an order requiring us to cease and desist from discouraging membership in the American Newspaper Guild; from discriminating against any person by reason of that membership; from interfering with, restraining, or coercing any of our employees in the matter of membership or collective bargaining; and affirmatively, to reinstate Morris Watson, with back pay, during the period of his suspension, at the rate of $295, which he was receiving at the time of his discharge, less any sums he might have earned by his own individual efforts in the meantime.

We declined to comply. Thereupon the Board appealed, as the statute authorizes, to the circuit court of appeals, asking an order directing us to comply with that order of the Board.

The circuit court of appeals, after hearing, affirmed the order of the Board, and granted an order of enforcement, and from that order of enforcement we are here.

Now, before I get to the statute and our specific objections to it, I think I should say something by way of further description of the parties themselves, because much of the argument I propose to make will turn upon the facts in relation to the Associated Press and the facts in relation to the specific duties of the discharged employee, Morris Watson.

Your Honors are already advised of the nature and character of the Associated Press, as a result of other litigation. You know that it is a membership corporation under the laws of the State of New York and that its members are newspapers published throughout the United States, some thirteen hundred or more in number; that for those members the Associated Press collects, compiles, formulates, and distributes intelligence or news, by specific contract between itself and each of its members, under which they are required to accept and pay for the proportionate cost of such news as the Associated Press may send them, and are also required to forward to the Associated Press any news originating in their neighborhood which is of general interest and importance.

The Associated Press has a highly decentralized or broken-down organization, as the report of the Board describes it. There is an eastern division, the office of which is in New York City, the southern division in Atlanta, central division at Chicago, western division at San Francisco, a southwestern division at Kansas City, a bureau in Washington, and foreign services in a great many countries in the world.

It also has exchange arrangements with some of the foreign agencies of the same character: Reuters in England; the Canadian Press, which is organized on much the same line; and the Domei-Tsuchin-Sha, if my Japanese pronunciation is correct, which is the intelligence agency in the Empire of Japan.

From these sources news is interchanged from office to office and from office to newspaper.

The Associated Press is not a selling organization. By the terms of its charter it is forbidden to make a profit. It is an organization conducted at the cost of its members; and they are required, by a method of computation based upon the populations which they serve, to contribute proportionally to the cost of the enterprise. It serves its members and its members only. It does not operate for itself any instrumentality of interstate commerce or means of communication. Its uses the telegraph lines, the telephone lines, the radio to some extent, the mails of course. It has what are called "leased wires", a term which is a colloquialism and not a description of fact. It has service contracts with the telephone and telegraph companies by virtue of which they agree to supply over their wires and with their facilities a certain amount of communication at rates that are fixed.

It is not in any sense, therefore, an agency or an instrumentality of interstate commerce, and, as I shall say later on, it bears no analogy whatever to the railroads, the telephones, or the telegraphs, which are common carriers dedicated by the law of their being and by their own consent to the continued service of the public at large.

The Associated Press, so far as any legal obligation is concerned, could suspend any part or all of its service tomorrow and there could be no objection, except perhaps some contractual obligations with individual members which had not been fully carried out.

It is not a mere conduit of news. The news comes into these divisional offices, as I have said, from one source and another, and goes to the editorial desks, where it is written, rewritten, formulated, sifted, selected, or suppressed, and in that intermediate process the news which finally emerges may be, in form if not in fact, entirely different from the news which comes in.

That is rapid, it is true. Transit is very rapid in case of such an event as the death of a foreign ruler. A flash from abroad on the death of the King of Great Britain would probably emerge with practically no formulation within the New York office within the space of a very few minutes. Or it might, if the news was not of such nature as to be of an emergency character, go through the process of formulation, depending entirely upon the nature of the event and the character of its report. But some suspension of transit occurs inevitably as it goes through what I describe as the sifting and formulating process of the editorial desk.

The New York office is divided into two distinct divisions. There is, first, the traffic department, and that department looks after the dissemination of the news It is headed by a so-called "puncher." The "puncher" hands the news to the telegraph operators or the telephone operators for transmission, and then it takes its flight over the wires, over the air, to its ultimate destination.

The other department is the news department, in which these editors and reporters play their part. In the news department they collect, write, rewrite, formulate, select the news that may come in. As the Board's witness, Hippelheuser, described it, he himself being one of the editorial employees, the editorial employees are engaged in production, the others in the dissemination of news and features and photos, and as the Board said in its report touching these editorial employees, the operations of the editors and editorial employees require a high degree of skill, for they must be able to determine the news value of an item and to rewrite copy with speed and the utmost accuracy, and I need hardly repeat to this Court the boast—and I think the perfectly warranted boast—of the Associated Press, that it aims, above anything else, at impartiality and accuracy in the news it delivers; so much so that I believe it can be

said without undue boasting on their part that to the reading public of America the letters "Associated Press" or the symbol "A. P." is a guarantee to the reader that he is receiving uncolored, impartial, and accurate news within the limit of human capability.

Now, I have stated to the Court our constitutional objections to this act, and before I take up the act itself, as I propose to do, paragraph by paragraph, I want to lay to one side certain subjects which, when I state them to the Court, will at once disclose their irrelevance to the questions which we are about to discuss.

This case does not turn in any sense on the subject of collective bargaining, its merits, or its demerits, its wisdom or its unwisdom, its blessings or its injury, its virtue or its vice, or on the right and power of laborers of all character to unionize for common purposes if they see fit. The right to combine for such a lawful purpose has in many years not been denied by any court, said Your Honors in *American Steel Foundaries* v. *Tri-City Trades Council* (257 U. S. 184), and not since the antique doctrine that a combination of men to raise their wages constituted an illegal restraint of trade finally perished from the reports has the right itself, so far as I know, the right per se, the naked right, been denied by any judicial tribunal in this country. It may be abused, no doubt has been abused, but its existence does not derive from any declaration contained in this statute or in any other, because it antedates the statutes and was the subject of judicial recognition long before this act or any similar act was passed.

What is involved here is the power of the Federal Government to make collective bargaining compulsory in all the industries of this country. We challenge that power.

This case does not turn, in the second place, on the question whether or not the Associated Press is engaged, as to some of its activities, in interstate commerce. Some of its activities may be conceded to constitute interstate commerce. It is equally clear, as we think, that some of its activities do not constitute interstate commerce, and we think it to be clear that as to its editorial employees their duties are no more interstate commerce than that of a draftsman engaged in drawing plans for a steel mill or the tenders of looms in a textile factory.

And, in the third place, this case does not turn upon the reason or unreason of Watson's discharge. There was nothing about his discharge which could give any right of action under this act. He was an employee at will for no fixed term, and both he and employer had the right at law to terminate that relationship whenever they saw fit, without incurring any financial or other responsibilities.

Nor was it such a relationship as any court of equity could have enforced, for, of course, the doctrine only needs to be stated that a court of equity will not enforce a contract for the performance of personal services.

The case does not turn on whether or not the reasons which his superiors gave for discharging him were true or false, whether when they declared his work not up to the capacity, up to the level for which he had shown capacity, that statement was true or false. I think that now is entirely inconsequential.

Whether the Board was right in holding that was a mere excuse and that there lay behind it some other ingenuous purpose is of no consequence.

I would say this, that I think if Your Honors would take the time to read the testimony of Watson himself before the Board or its examiner and look at the picture he there drew of himself, Your Honors will have no difficulty in concluding that a prudent employer was justified in severing his relationship.

But all that aside—the question here is whether the Federal Government has the power, through its agencies, to compel his reinstatement in this relationship that his employer chose to terminate.

Now such power as there may be is the power that underlies this act, which is asserted, as I heard the learned Solicitor General say, in the analogous case of the Railway Labor Act, to be bottomed solely upon the commerce power.

We assert that it is not a valid exercise of the commerce power, either in general or in its application to the Associated Press. We assert that the act by its scope outruns the commerce power and is an effort to regulate matters that fall far outside of the field, and that that appears by the act from its preamble, from its definitions, from its operative or effective sections, and from its legislative history, and that there shines through the act a clear and studied purpose on the part of Congress to bring all the industries of the country, as far as language can accomplish it, within the reach of the supervision of the National Labor Relations Board.

Now, with so much by way of preface, may I invite attention to the act?

It is entitled "An act to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes", a title which, taken with the act itself, speaks plainly as to what can be brought within the compass.

The first section of the act, by way of preamble, is denominated "Findings and policy", and I invite the attention of the Court to the findings and policy which are an expression of the congressional hopes, and I shall argue that those findings and policy are not satisfied by a confinement of the act to legitimate commerce between States.

Says the act:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce;

Reaching back of their injection into the channels of commerce and attempting to reach causes that touch their quantity and their ultimate price.

or (d)—

We get farther and farther away—

> causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

Interstate commerce is to be regulated by avoiding a diminution of employment and wages, which would lessen the purchasing power of the worker and theoretically at least diminish the ultimate market.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

That is a recital of purposes and reasons coextensive with the entire industrial and commercial life of the country, and no regulation, presumably, which could attain that end could possibly reach these objectives unless it were all-inclusive. Regulations devoted only to those employees who could be found to be engaged in the active commerce could not preserve the economic level of the country alone or prevent this alleged injury to the general market and the maintenance of prices.

But the preamble, of course, is not a part of the statute, except as it may indicate the atmosphere, if you please, in which it is to be read.

Now we get to the definitions—

The term "employer" includes any person—

there being no limitation on that phrase—

acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, —

taking out of the scope of the act all of the railroads of the country—

or any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and 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—

An employee who has been wrongfully discharged remains an employee under the terms of the act until he has found another job.

And then we get an exclusion which by its very terms shows the all-inclusive character of the original phrase—

but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

If it was the purpose of this act to include employees all and sundry why should it have been necessary to exclude agricultural laborers and domestic servants, notoriously people who are not engaged in anything that could be remotely called interstate commerce?

The term "commerce" under section 6 of the definitions—

means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States—

in quite the orthodox form. I make no complaint of that definition of "commerce."

Section 7, however, we advance from that—

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.

And I postpone comment on that because I want to mention it later in connection with the power of the Board.

The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association of 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.

It would seem that the disputants may not maintain toward each other the relation of employer and employee, yet in some mysterious fashion the employer and employee who are not concerned in the identical dispute are to be brought within the compass of the act.

Now I submit that those definitions can only be read as an all-inclusive effort to draw the industry of the country within the borders of the act.

We come to the definition of rights and wrongs, which are the real core and center of the act around which the act revolves. All else might be said to be adjective. This is substance.

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Which I submit is a declaratory section and can confer no new or substantive right.

SECTION 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

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

He need not form a company union, he need not dominate a company union, but he dare not make any contribution to a union of his employees, no matter how independent it may be.

Provided, That subject to rules and regulations made and published by the Board—

And only subject to such rules—

an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

He may not contribute to their organization, but he cannot let them confer with him without loss of time or pay, save subject to such rules and regulations governing that approach as the National Labor Relations Board may see fit to prescribe, and I assume that under this if the employee came to confer with his employer about his working hours or whatever, the employer would first have to look to the rules

138858—37——5

and regulations and see whether he was authorized to speak to him, and if not within the rules, to tell him that he was on his own time and it would be taken out.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization—

That covers, of course, the whole life of the employee. There must be no discrimination as to hire or tenure or any condition—no shift of work, no assignment from one shop to the other, if there is an underlying purpose thereby to encourage or discourage membership in any labor organization.

It confers, as the Circuit Court of Appeals of California has said, and undertakes to confer, a civil-service status upon every employee so that whenever there is any shift in his relationship toward his employer, he may assert a coercive purpose and may take his case before the National Labor Relations Board or its divisions.

Then we come to a proviso—

That nothing in this act, or in the National Industrial Recovery Act, * * * as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice)—

That is, with an outside organization—

to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

He may not discharge his employee because of his membership in an organization. He may not discriminate against him because of his membership in a labor organization. But he may make a contract with the labor organization by virtue of which he will discriminate against those who are not members of it.

In other words, it is an open declaration, we think, that the purpose of the act is to make the closed shop universal and compulsory.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

And:

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Those sections against which the order in the present case runs are sections 1 and 3. The trial examiner of the Board held that there should also be an order against us under section 5 requiring us to bargain collectively with the American Newspaper Guild, but the Board very properly said that there was no such charge made in the complaint under which the proceedings were originated and it would postpone that to a later date.

Now, in those effective clauses I called to the Court's attention, under the subject I am now discussing, there is no limiting phrase whatever which confines the employers and employees at which the act is directed to those who are engaged in the act of interstate commerce.

The next section of the act provides for the representatives and elections:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*—

Here is for the unfortunate minority a crumb of comfort—

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

The minority who do not belong to the unit selected as the exclusive agent for bargaining but are to be bound by it nevertheless, either individually or as a group, are preserved the right of petition—and nothing more—for under the terms of the act the contract which is made by the selected majority is binding upon them and upon their employer as well.

Then we come to—

(b) The Board shall decide in each case whether * * * the unit appropriate for the purposes of collective bargaining—

and I call Your Honors' attention to the fact that no standard is set up by which the Board may exercise that duty of selection; no guide is offered to them in deciding what is the appropriate unit, whether it is the factory unit or the trade unit or the craft unit or the plant unit. The Board is given uncontrolled discretion to name the unit appropriate, and when the unit has been named a majority of that unit binds everybody in the plant.

Now we come to section 10 (a): The learned Solicitor General insists that I, in reading the act, as I have just done, and as we read it in our brief, were entirely too literal about it; that the act bears a construction more benign than we would give to it; that we must start with the assumption that Congress did not intend to exceed its jurisdiction over interstate commerce, and that there are lodged in the act technical phrases upon which that construction can be based. Whether that construction would save them in this case is a question I shall come to in a moment, but as to the all-inclusive character of the act, it is asserted that the definition defines interstate commerce in the orthodox terms; that it then passes on to a section in which they undertake to define "affecting commerce", being careful, however, in that definitive clause not to mention the words "directly affecting commerce."

And finally we come to section 10 (a):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

The employer and employee can no longer set up their own arbitrary machinery. The power of the Board is to be exclusive. In that there is the phrase "prevent any person from engaging in any unfair labor practice affecting commerce"—not "directly affecting commerce", not "affecting commerce" as that phrase has been defined by the prior decisions of this Court. And if we want any light on the subject as to what, in the opinion of the Board, is to be the interpretation of that clause, we only have to turn to their terms. Says the learned Solicitor General:

That clause imposes upon the Board a duty to inquire in each case whether the dispute does or does not affect commerce;

that it is left to the Board by what he is pleased to call an ad hoc application of the statute to determine whether the instant controversy is within or without the congressional intent.

But as for producing industries in the country, the decisions of the Labor Board, which are now available in printed form as a public document, demonstrate that the only test the Board has ever applied as to whether any controversy, large or small, affected commerce, was whether the raw materials of the industry, all or part, were drawn from without the State, and whether the finished products, in whole or in part, were shipped without the State after they were finished.

And wherever the Board has found those circumstances to exist it has declared, as the basis of its jurisdiction, that it had detected a flow of commerce, and as you read the decisions of the Board you can only conclude that the word "flow" is to them the grand, omnific word that disposes of all their doubts and controversies, and wherever they find any prior or any subsequent movement in interstate commerce they describe the result as a "flow", and they proceed to adjudicate.

The discharge of a few girls in the canvas-glove factory in Brooklyn, the refusal of a reconditioner of soiled burlap bags to bargain collectively, the statement by a soap maker in California to one of his men and to men in general that they ought not to "join this damn one-horse union", discharge by a manufacturer of woolen underwear in Richmond of two out of his five cutters—all those things and many more are held by the Board to have affected the flow of commerce.

I make no complaint of the triviality in many of these cases. If this law is a law at all, it must apply to the great and the small alike, and if this theory of interstate commerce can support this sort of intrusion, then it must be clear that no workman in the United States in any of its productive industries can be discharged, or even the terms of his daily labor altered, and the place, without a hearing before the National Labor Board; and the very magnitude of the probable task ought to be enough to make men of average humility shrink from its assumption.

The universality of this act, reading its preamble, reading its effective clauses, is its very bone and sinew, and it appears so from the reports of the committees of Congress that had it in their charge.

It seeks—

Says the Senate,

to prevent unfair labor practices, whether they burden interstate commerce, by causing strikes or by occurring in the stream of interstate commerce, or by overturning the balance of economic forces upon which the full flow of commerce depends.

As a regulation of commerce we are to penetrate into the economic life of the country and undertake to preserve the balance of economic forces upon which the full flow of commerce is said to depend.

Now, if the act lacks the universality that I assert, a universality which must be necessarily fatal to it, if it admits the construction which the learned Solicitor General would put upon it in order to preserve some part of its efficiency, will that construction, applied to the instant case, make out of the relations between the Associated Press and its editorial employees anything that, by the remote stretch of the human imagination, can be considered commerce between States?

I take it that there are some axioms which have settled into the jurisprudence of this country too firmly for disturbance. I take it that no man would pretend that the power of Congress is not confined to interstate commerce and those matters which directly affect it; that interstate commerce itself is an act performed, as one of the decisions says, by the labor of man with the help of things, and that it is only when men are engaged in the act itself or when they are engaged in activities that directly affect the performance of that act, by others, that they come within reach of the Federal power.

And I suppose, contrary to what one sometimes hears, no one will seriously try to argue in this Court that the right to engage in interstate commerce is a privilege and not a natural right. Antedating the Constitution as it does, it is not to be granted or withheld at the mere will and pleasure of Congress; it is to be protected against interruption; it is to be guided by rules appropriate to its exercise, and its abuse is to be prevented by acts which would be injurious to the public welfare.

But so far, and no further, as I contend, can the congressional power extend.

What is the pedigree of necessities that they think support the act so far as the Associated Press is concerned? They say the Associated Press is engaged in interstate commerce. This act regulates the Associated Press. Therefore, this act regulates interstate commerce, and, if the faint glimmerings of my collegiate logic remain with me, I think that syllogism has the fallacy of the undistributed middle.

The Associated Press is engaged in the dissemination of news. The dissemination of news constitutes interstate commerce. News cannot be disseminated unless it is gathered. News after it is gathered cannot be used until it has been written. Editorial writers are necessary both to edit and to gather the news, and if no news is gathered no news can be transmitted. Editorial writers, being like most artists, perhaps temperamental, must be content, of a contented mind, before they can efficiently perform their duties. A contented mind can only be based upon satisfactory working conditions, hours, and terms of payment. Satisfactory working conditions, hours, and terms of payment can only be brought about by collective bargaining.

Ergo, to force the Associated Press to engage in collective bargaining is a bona-fide regulation of commerce. And that, I respectfully submit, is nothing but a repetition in argumentative form of a nursery rhyme of The House that Jack Built. You can stretch out the relation of cause and effect, according to the philosophers, to the very beginning of time, for I understand their theory is that there has been no interruption of cause and effect since the water first rolled back from the land, and probably beyond that we get to the cause. But those are not the revolution by which the Constitution of the United States can be interpreted or by which Congress can broaden its power to subjects that were never committed to it.

I repeat, as I said before, and as I shall perhaps repeat in another branch of this argument, the Associated Press is not an instrumentality of commerce. It is not a railroad. And I shall not enter at all into the scope of the congressional power in regulating the labor relations between the railroads and their employees. They, it may be said, are dedicated, by their being and by their consent, to a continuous public service, and it may be that anything necessary to preserve the continuity of that service which is the law of their nature is within the

power of the regulatory body. But there is nothing of that sort with this Associated Press here. It is not a carrier for hire.

The circuit court of appeals, deceived by this analogy, said it was an interstate system devoted to interstate communication. Admit all of that, and as I see it, it does not advance the argument for the application of the law to the Associated Press and its editorial employees in the least. They are engaged, these editorial employees—I used the phrase in the court below that they were engaged in the manufacture of news, and the double implication of that caused me some embarrassment, and therefore I do not use that phrase here—they are engaged in the production of news, in its obtaining, in its formulation, in its preparation; but as truly a productive enterprise as that of the roller in the steel mill or the herder of cattle on the western plains or the agricultural laborer on his farm.

Now, of course, the Government is driven to some very old means in order to sustain their contention on this subject. We hear again of the "throat" cases, *Stafford* v. *Wallace* (258 U. S. 495), and the rest. We hear of the railroad case, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548). We hear of the strike cases, *Coronado Coal Co.* v. *United Mine Workers* (268 U. S. 295), and so on. Your Honors are so familiar with that that a word in differentiation would indicate our point of view. There is no throat here. There is no current here. We do not sit like the stockyards, abreast a current of commerce which other men are trying to conduct, and which by the Stock Yards Act they were forbidden from interrupting. This is our commerce, and what this law proposes when applied to us, is to regulate us, not in order that we may be prevented from interrupting the commerce from other people, but to regulate us, in order that we may be prevented from interrupting our own business—which is a horse of a very different color.

The railroad cases stand on their own footing. And I was interested to see the effort made by the learned opponents' brief to bring the doctrine of the strike cases to the support of this act. In the strike cases, as Your Honors have pointed out, there was a clear intent to interrupt interstate commerce, and interstate commerce was the object of attack.

Now here is the reasoning by which this act is supposed to bear on this situation: "consequently", says my learned friend, "where the situation in a particular enterprise"—and this act, if I am right, embraces all enterprises—"presents a reasonable likelihood"—no question here of certainty or inevitable result—"a reasonable likelihood that a dispute would occur which"—and we are supposed to imagine a dispute—"would involve an intent"—this hypothetical dispute would involve a hypothetical intent to restrain commerce—"to restrain commerce"—then the Board can apply the statute to that enterprise.

There is a chain of hypotheses. We must first hypothecate a reasonable likelihood. We must next imagine a dispute. And third, as a third hypothesis, mounted upon the other two, must imagine that those who engage in the dispute would have an intent to restrain commerce; and then on that hypothesis we take possession of the enterprise and regulate it.

So much for the interstate-commerce features of the act, which I lay aside.

The second point is that the statute is a direct violation of the fifth amendment.

Justice SUTHERLAND. What amendment?

Mr. DAVIS. The fifth amendment. It is so because it is an invasion of freedom of contract between an employer and an employee who are engaged in a wholly private occupation. And as to which invasion no emergency exists or is so much as alleged.

It is a sweeping undertaking to regulate the right of men to sell their labor, and the right of men to buy it.

We understood that under *Adair* v. *United States* (208 U. S. 161), *Coppage* v. *Kansas* (236 U. S. 1), and *Wolff Packing Co.* v. *Court of Industrial Relations* (262 U. S. 522), the power of the legislature to compel continuity on a business can only arise where the obligation to continue service by the owner and his employees is direct and is assumed when the business is entered upon. That is the criterion. And that in normal relations between employer and employee no Government, the fifth amendment standing, can undertake to step in and make contracts in their name.

We assert that the act is bad under the fifth amendment not only because it imposes this compulsory collective bargaining from which all permissive features have been removed, not only because of its scope, but because of the methods to which resort is had.

Now the learned Solicitor General says that question is not in this case; that we are not concerned with the compulsory bargaining which the act undertakes to make, because that hand has not yet been laid upon us; that we are only entitled to concern ourselves with the discharge of this particular employee and the effort for his reinstatement.

To which our answer is, first, that the act is an entirety; that it is impossible to read the act and hold that it is susceptible of any separation; that the whole object and purpose of the act, the declared object and purpose, fall unless compulsory collective bargaining is the end and aim; that, moreover, in the order which the Board entered against us requiring us to reinstate this employee they also required us to abstain from restraining, interfering, or coercing him in his right to bargain collectively, as declared by section 7 of the act.

I shall skimp this part of my argument partly in deference to the learned Solicitor General's assertion that I am quite outside the latitude of facts, and partly because this case is to be followed by others where I know learned counsel will develop this subject at greater length.

But let me indicate what are the specific points on which we think these provisions of the act are arbitrary and unreasonable.

First is that the employer, and the employer alone, is reached by this mandate. It is only the employer who is compellable to bargain. No such mandate is laid upon his employees or upon any association or union they may choose to form. On the contrary, not even is the duty of observance, after a bargaining has been had, laid upon the employees, for the thirteenth section of the act specifically provides that—

> Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

A collectively bargaining employee may refuse to collectively bargain. The collectively bargaining employee, after he has collec-

tively bargained, has lost none of his right. He is given the collective right to strike whenever and wherever he sees fit. He arbitrarily says that he is subject to the majority rule. After a unit has once been chosen the vote of the majority of that unit makes them the exclusive bargaining agent.

Now, that is sought to be defended on the ground that that is democracy; that the system of majority rule is one which in this country, under our democratic institutions, we have become thoroughly accustomed to, and for which there is no substitute, and therefore, say the proponents of this act, it is quite formal and proper to write into the act the majority shall control for all.

But the analogy, if the Court please, is utterly lacking in foundation. Majority rule prevails under democracy in matters of government solely because no other organ has been found by which a democracy may express its will. There is no other method under a democracy by which the officers of the Government may be peacefully chosen, except by an acquiescence in the will of the majority. It is an integral part of democratic government ex necessitate, but there is no reason that because of that it is ex necessitate a part of the dealings of the individual men, with their individual rights of person and of property. There is no reason, because a man is compelled by the very existence and form of his government, to yield to the majority, why he should be compelled against his will to appoint some other agent to dispose of his own individual rights. When a law undertakes to deprive a majority, large or small it matters little, of their right against their will, and their own labor, and their own terms, and their own conditions, the fifth amendment is clearly invaded.

And it is not, may I say, a thing of which the employer cannot complain. Because, of course, to deny the minority the right to deal with the employer is to deny to the employer the right to deal with the minority. There is a reciprocal relation, and it is as much the invasion of one as it is the invasion of the other.

I have referred to the closed union shop. I have referred to this arbitrary selection of bargaining units. I have referred to the outlawing of company unions, and I pass that whole subject to go on to what seems to me perhaps the most important subject I have to present to this Court.

I assert this act, as applied to the Associated Press, is a direct, palpable, undisguised attack upon the freedom of the press.

Now, let me remind Your Honors of the nature and character of the parties involved in this controversy. The Associated Press, it is true, publishes no newspaper; but, as the Government has been at great pains in their brief to demonstrate, it is the largest of the news-gathering agencies of the country, and its activities are Nation-wide. It supplies, under contract with its members, a very large part of the news they furnish the reading public of America, and under contract which requires them, if they take it at all, to take it as the Associated Press gives it, and so much as they publish to publish in that form, with credit to the Associated Press.

The Labor Board was at pains to admit copies of newspapers here, there, and elsewhere, showing how many columns of their news bore the credit line of the Associated Press. That was in support of the argument that a suspension of news in the Associated Press office would cut off the newspaper, for which, may I say in passing, there

is a lack of factual basis. Desperate effort was made to get the manager of the Associated Press to admit that if the employees stopped in the New York office where Watson was employed, that would tie up the system, and he quietly declined to agree to that.

The Associated Press in the news columns is as integral a part of the press of the United States as the Washington Post or the New York Times. Indeed, without derogating from any individual publication, it may be said to be far more important than any one of them. There is no agency in this country that surpasses—I question greatly if there is any paper or agency in this country that equals—it in its furnishing of the information to the American public.

Who is Watson? Watson was not a mechanical employee. He was not a telegrapher whose only function is to send over the wires what is given him. He was not a man to whom manuscript was sent, and he had nothing but a mechanical function in connection with it. He was the writer, the reporter, the rewriter, the composer of headlines. As he himself said, he wrote the "leads." As I understand that newspaper phrase, it means the opening paragraphs of a story where they are supposed to give you the whole gist of it for tired businessmen in a few sentences. And I think somebody—I won't risk the name, because I would probably be wrong—but some epigrammatist says "If I may write the songs of a nation, I care not who makes its laws." And I think it might be said in the newspaper world that "If I write the news of the nation, I care not who writes its editorials." And I think we might pass on from that still further and say, "If I may write the headlines and the leads of the news, I care not who writes the rest of the two-column story."

That is the business in which Watson was engaged. Now it is proposed to say to the Associated Press, "You cannot put somebody else in that chair. You must take Watson and Watson's work and Watson's selection, broadcast that over your channels of communication throughout the United States."

Is that an invasion of the freedom of the press, or is it not? What is the freedom of the press? Why, the learned Solicitor General says in his brief a newspaper publisher does not have a special immunity from the application of general legislation, nor a special privilege to destroy the recognized rights and liberties of others. And of course he does not, and who would so contend. But he does have a right to live under the law, and the law, the supreme law, is that the press shall be free—not partially free—not free with discretion in this or that public officer—but free—not only free from advance censorship which says what shall be published or how much, but, broader than that, that it shall have the right to formulate, to disseminate, the news of the day to the people of the United States, so long as it does not invade the laws of libel or incite to some form of crime.

And nothing less than that can be guaranteed by the freedom of the press—not as a privilege to the newspaper only, not that he may stand a class apart above his fellows, but, as Your Honors have said, if we fetter the press, we fetter ourselves, and in order that democratic government may be fed with the only thing which can keep it alive the Constitution forbids the invasion of this field.

Now, I need say no more in defense of that doctrine. What about its application? They say that our only complaint of any invasion is that Watson would be biased as a labor-union man in the news he

might collect, and therefore we rely solely on bias. As the brief of the amicus curiae states, we are reduced to the status of asserting that a labor-union man would be more biased than a nonunion man, and of course that has nothing to do with it in matter of principle.

It is not that he may be more biased, not that he may be less biased, but it is that those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. For you cannot divorce in this field the author from his product. You cannot have Dickens' novels without Dickens, and, although that lies in the field of creative fiction, when it comes to a report of fact you cannot have Macaulay's novels without Macaulay. What is written is the news, and the man who writes it is utterly inseparable from it. Two men may go and witness the same state of facts ocularly, and they write their stories. One story may be live and vibrant and appealing to the public imagination, or, if you choose, it may be slanted and colored so as to distort the facts; and another man who sees exactly the same thing will write something entirely different.

Can the newspaper be free if it is not able to choose between those authors? Suppose one of our dictator neighbors in Europe should say—and I have no doubt it has been said—to the press of Germany or of Italy or of Russia or what you will—to the newspaper publisher, "You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party. Of course, you may do otherwise, dismiss him for any other reason, but you cannot dismiss him for that reason." Is it conceivable that that would leave the press free? Is it conceivable that that would not be an invasion of the newspaper proprietor's rights, if he had any? Indeed, what more effective engine could dictatorial power take than to name the men who shall furnish the food of facts upon which the public must feed?

Another illustration: The fifth amendment forbids the establishment of a religion or any law prohibiting the free exercise thereof. If some legislative body were to enact that no congregation—or if it had chosen under its church polity to set up an administrative, ecclesiastical agency for the purpose—that no minister should be dismissed from his congregation because, forsooth, he had joined the Ministerial Guild. Would that prohibit the free exercise of religion? Would it diminish the right of free exercise if the congregation who is to sit under the ministration of this minister were robbed of the right to select in any respect the minister they chose to take? Could it be disguised that that was an effort to prohibit the free exercise of religion, the thing which the Constitution puts not within the qualified reach of Congress but absolutely beyond their approach?

"Now", said the court of appeals—and I am sorry to say they gave this branch of the subject very short shrift—in fact, I am not sure they mentioned it—"The act", says the court of appeals, "does not hamper the legitimate right of the employer who may discharge his employees for inefficiency or any other cause agreeable to him, provided he does not use the power of discharge as a weapon for interfering with the right of employees to organize and bargain collectively. The employer retains full control to bargain with his employees over the wage he shall pay and the working conditions he shall furnish, and he remains", in the conception of the court, "the master of the operation of his business."

How can one remain the master of the operation of his business if his right to hire and discharge is qualified in any way whatever other than by his own voluntary contract for employment at a term? How can a newspaper remain the master of its business if the right to select those who compose its editorial page—and even more important, as I understood, from the standpoint of the effect upon the public at large, those who shall compose its newspaper columns are no longer within its choice. A man who is publishing a labor journal has a perfect right to do it. He has a right to make his labor journal just as partisan in the interest of labor as he chooses, and if he is wrong about it our American theory of the truth must ultimately prevail. Shall we say that, without impairing his freedom, "You shall not discharge any editorial or news writer or reporter simply because he refuses to join a labor union, simply because he is entirely out of sympathy with the cause you are trying to promote? You can discharge him for any other reason—the color of his eyes, if you please, but you cannot discharge him for that." Would or would not that invade the freedom of the man who is publishing that journal?

Why, put it in a sentence, if the Court please: that the author in this field, the maker, and the thing made, the author and the product, are one and inseparable. No law, no sophistry can divide them, and if you restrict the right to choose the one you have inevitably restricted the right to choose the other.

I submit that whatever may be said about this act, whether it is as fatally inclusive as I contend, whether there is a field where its operation may lawfully be effected, if there is one field under the Constitution of the United States that escapes congressional intrusion, that field is the freedom of the press, which the order entered here clearly and directly invades.

ORAL ARGUMENT ON BEHALF OF RESPONDENT

Mr. Wyzanski. May it please the Court, in the course of my argument I shall begin with an exposition of the statute to deal at once with the question whether the act is fatally defective, as the petitioner has said, on the ground that it is universally applicable. After that I shall consider whether the Associated Press comes within the terms of the act in connection with its editorial employees in the New York office. And then I shall pass on to consider the first main constitutional question; that is, whether the regulation here applied is a reasonable regulation of commerce. And lastly, I shall discuss the point whether, from the commerce angle, the statute is separable. My associate, Mr. Fahy, will take up the question whether the act as here applied violates the fifth amendment, the seventh amendment, or the first amendment.

I turn at once to the statute, and I shall be brief in discussing it, for Mr. Davis has read most of its provisions to you. At the outset is the first section to which Mr. Davis has referred as a preamble, but it is entitled "Findings and Policy." He has read to you the four paragraphs which constitute that section. I shall not go over them in detail, but shall point out that they discuss one situation in two very different aspects. The situation is the refusal on the part of employers to bargain collectively with their workers and the refusal to allow their workers the right of self-organization. From that one situation it is said that two consequences follow.

The first is that the refusal promotes industrial strife which burdens and obstructs commerce. The second evil which is said to follow is a demoralization of wage rates on account of inequalities of bargaining, and that that demoralization aggravates depressions and the like.

Now, the first evil upon which the power of Congress is based—that is the constitutional foundation for the act. It is only insofar as industrial strife burdens or obstructs commerce that this act by its terms is or was intended to be applicable.

The second evil, the demoralization of the wage structure, may have something to do with the reasonableness of the regulation, but it is not the foundation of or the source of congressional power. In view of the rulings in *Schechter Corp.* v. *United States* (295 U. S. 495) and *Carter* v. *Carter Coal Co.* (298 U. S. 238), we make no contention here that the demoralization of a wage structure has anything to do with the source or foundation of congressional power.

The second section contains a number of definitions, one of which I will return to later. Then follows section 3, which sets up the National Labor Relations Board, consisting of three persons appointed by the President and confirmed by the Senate.

Sections 4, 5, and 6 relate to the internal mechanism of the Board. None of those sections is here involved. They merely relate to the work of the Board, the administrative work of the executive board.

I shall return to sections 7, 8, and 9 shortly, but I turn to section 10, which in our opinion is the crux and heart of the statute. Section 10 (a) provides that—

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

Now, there are two critical phrases in that sentence. First, it must be an unfair labor practice listed in section 8, and second, the practice must be affecting commerce. I shall deal with each of them in turn. Mr. Davis has read to you the five unfair labor practices listed in section 8. Only practice 1 and practice 3 are here involved, and they are the only ones which at this moment I will stop to discuss.

The first one makes it an unfair practice for an employer to interfere with, coerce, or restrain his employees in the rights guaranteed in section 7; and section 7 provides that employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection. That is tied in, as I say, to the first unfair labor practice.

The third unfair labor practice which is also involved in the case at bar makes it an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

To that third unfair labor practice is attached a proviso to which petitioner has referred and to which I shall very briefly advert. The petitioner has said the proviso is intended to set up the closed shop. Mr. Fahy will deal with that point at greater length, but I merely want to point out that the proviso has no such effect. The proviso merely states that no Federal statute other than the Railway Labor Act shall be considered to curtail the power of the employer to enter into a closed-shop contract. In other words, it leaves the law, the local law, just as it was always. If a State statute or State judicial decision outlaws the closed shop, this statute does not legalize it, and if an employer does not choose to have a closed shop there is nothing in this act which by any possibility can compel him to have a closed shop.

Now, I have described the first of the two limitations in that critical sentence in section 10 (a); that is, that the Board is empowered to prevent certain unfair labor practices, that is, those which are enumerated in the statute. It has no general power to prevent unfair labor practices of any kind.

I come to the second limitation, and this limitation is, in the highest sense of the word, a jurisdictional limitation upon the Board and a limitation upon the scope of the statute. The practice may be prohibited only when it is "affecting commerce." Now the term "affecting commerce" is defined in section 2, seventh, and it is defined as follows:

> 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.

That language, about which I shall have a great deal more to say tomorrow, is language taken from the decisions of this Court. In our opinion there can be no doubt whatsoever that the language restricts the Board and the statute to the constitutional sphere of Congress. Now, there may be a difference of opinion as to how broad that language is, but there can be no question at all that the language restricts the Board and the act to situations which this Court has already said are within the power of Congress.

In addition to section 10 (a) and the allied sections to which I have already referred, there are certain miscellaneous sections in the statute, such as section 9, which provides that when a question affecting commerce arises with respect to representation of employees the Board shall have jurisdiction; and then section 11, which provides for the use of the subpena power in connection with section 9 and section 10; and section 12, which imposes a criminal penalty upon persons who physically resist agents of the Board.

But the heart of the statute is section 10 (a), and when the Board, acting under that section, finds that a person has violated it, it issues a cease-and-desist order or requires the person to take affirmative action. Such an order carries no penalties and is not self-enforcing. Exactly like an order of the Federal Trade Commission, it may be taken by the administrative agency to the circuit court of appeals for enforcement, or an aggrieved party who objects to the order may take it to the circuit court of appeals to have it set aside.

The general nature of the statute being clear, I come to the question whether this petitioner in this case was within the terms of the statute. The nature of the enterprise of the Associated Press has been thoroughly dealt with by the petitioner in his argument. At the same time I wish to cover some of the ground again, in order to emphasize a few points which were not stressed in the petitioner's argument.

The Associated Press is, of course, the largest of the news-gathering agencies in the world. It has some 1,300 members, and it operates through various offices in different parts of the country and abroad. Its main office is in New York City. It has important divisional centers in Kansas City, in San Francisco, in Chicago, and Atlanta. It has, in addition, an office here in Washington, and it has a bureau in various capitals throughout this country and the world at large.

This might be a convenient place to stop.

The CHIEF JUSTICE. We will hear you further tomorrow.

(Accordingly, at 4:30 p. m., an adjournment was taken until 12 m. of the following day, Wednesday, Feb. 10, 1937.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 365

THE ASSOCIATED PRESS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORAL ARGUMENT

WASHINGTON, D. C.,
Wednesday, February 10, 1937.

The oral arguments in the above-entitled cause were resumed before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 12:10 p. m.

Appearances:

On behalf of the petitioner: Mr. John W. Davis, Mr. William C. Cannon, Mr. Harold W. Bissell, and Mr. Edwin F. Blair.

On behalf of respondent: Hon. Stanley Reed, Solicitor General of the United States; Mr. Charles E. Wyzanski, Jr., Special Assistant to the Attorney General; Mr. Charles Fahy, General Counsel, National Labor Relations Board.

The CHIEF JUSTICE. Proceed with the cause on argument, no. 365, the Associated Press against National Labor Relations Board.

ORAL ARGUMENT ON BEHALF OF RESPONDENT—Resumed

Mr. WYZANSKI. May it please the Court, when Your Honors rose yesterday I had finished the preliminary exposition of the statute and pointed out that it only applied in those cases where the practice either occurred in commerce or had led or tended to lead to a labor dispute which burdened or obstructed commerce, and I had started to discuss the facts in this case in order to show whether or not they came within the terms of the statute.

In general, the workings of the Associated Press have been adequately described by the petitioner, but I want to go in some greater detail into the methods employed in the New York office where these unfair labor practices were found to have occurred.

All forms of communication are used by the Associated Press—telephone, telegraph, mail, and messenger service, but the most common form of communication is by what are colloquially referred to as "leased wires", that is, trunk wires which various telegraph companies contract to allow the Associated Press to use. These trunk

wires are depicted on a map which is embodied in our brief at page 32, and stretch throughout the country. In addition to the main trunk wires, there are various subsidiary regional wires. The wires are not operated by the Associated Press Co., but to them are attached teletype machines. In many cases these teletype machines are owned by the Associated Press, and in all cases they are operated by "punchers" who may be called telegraph operators, if you please—punchers who are employees of the Associated Press and in its traffic department.

The way news is received in the Associated Press office in New York varies. Sometimes it comes over the teletype machine. Sometimes it comes by telephone, as the record at page 189 shows very clearly. When it comes by telephone the rewrite employee is assigned to go to the telephone, take the message over the telephone, and take it down. In the case of a message which comes in by teletype it is taken by the traffic department and ultimately finds its way to the rewrite employee. When the rewrite employee gets the dispatch he edits it so much as may be necessary. Often this process of editing is very brief. As the petitioner's counsel himself has told us, in an important case the matter may be handled in between 8 and 20 minutes. It may be handled in even less time than that in very exceptional cases.

When the rewrite employee has finished his work he takes it to the supervising editor, who has an executive desk in the Associated Press office, and from there, after such correction as the supervising editor may choose to give, it is passed on to the filing editor.

A filing editor stands in charge of each of these trunk lines which moves out of the city of New York. I don't mean to say that he operates the teletype machine, because he does not, but he determines which of the news that is given to him shall go over that line. His duties are well described at page 119 of the record, and it is shown that from the thousands and thousands of words which he is given every day he determines which part shall go over the line in order to make a balanced report for the particular line which he is filing.

It is in this setting that the editorial employees work and that Morris Watson, the employee whose discharge gave rise to this proceeding, was working. He at one time was a filing editor, but at the time of his discharge he was a rewrite editor.

I am not going into any great detail on the question as to whether or not his discharge was an unfair labor practice. At the bar yesterday counsel for the petitioner admitted that that question was not here. The question is not specified as error in the petition. Moreover, the findings of both lower tribunals are that the discharge was an unfair labor practice. And, in view of a well-settled rule in this Court, I am going to assume that there is no need to go through that evidence. Moreover, it is briefly summarized in our brief at pages 26 and 27 in the footnote.

I am going to devote my attention so far as the facts are concerned to the question whether this company's principal business is interstate commerce and whether its relations with its editorial employees affect interstate commerce.

There can be no question that not merely the transmission of news but the person whose news is transmitted is in interstate commerce.

From the time of Gibbons and Ogden to the present time it has been well settled that not merely the facilities of communication but the enterprises engaged in interstate communication are in interstate commerce. A well-known case is *International Textbook Co.* v. *Pigg* (217 U. S. 91), and a more recent expression from this Court is in *Fisher's Blend Station* v. *Tax Commission* (297 U. S. 650), where there is a dictum by this Court at page 654 that a person who speaks over a long-distance telephone or over a radio is engaged in commerce quite as much as the facility itself.

The petitioner has suggested that for various reasons this particular company, though engaged in interstate commerce and engaged in two aspects, both in communicating and in operating—so far as the teletype machines are concerned—an instrumentality of commerce, although it is in both those aspects engaged in commerce, it is not subject to the regulatory power of Congress. Several reasons are advanced.

First, it is said that this company is not engaged in business for a profit. Second, it is said it does not hold itself out to serve the public. And third, it is said that it is engaged solely in commerce with itself.

Now, I submit that none of these three arguments is tenable. It has been long settled, since *Caminetti* v. *United States* (242 U. S. 470), that it is of no consequence so far as the regulation of commerce goes whether the person engaged in it is operating with or without a pecuniary motive. And, moreover, if it were necessary to show a pecuniary motive it would be easy to do so on the facts in the case at bar, for the Associated Press not only in its incidental contracts, as for example with the Canadian Press and with the Keystone View Co., operates for a profit, but its whole enterprise is for the benefit of newspapers which operate at a profit, and, as this Court recognized in the 248 United States Reports, *International News Association* against *Associated Press*, the members operate at a profit, and presumably the money which they contribute to the Associated Press they recoup out of the profits of their own enterprise.

The second distinction which is attempted to be made is that this enterprise does not hold itself out to serve the public, and hence is not subject to regulation under the commerce clause.

A sufficient answer to that contention is supplied by the case of *United States* v. *Brooklyn Eastern District Terminal* (249 U. S. 296), where the question was whether the Federal hours of service law could be applied to a terminal which did not hold itself out to serve the public generally but which had special contracts with 10 interstate carriers and with sundry steamship lines. This Court held that the Federal hours of service law could be applied to that company, and it indicated its approval of lower-court decisions holding that the Federal safety appliance act could be applied to carriers which were not holding themselves out to serve the public.

Moreover, it is very doubtful whether, even if there were any doctrine such as that for which the petitioner contends, the petitioner would be within it; for, though it does not hold itself out directly to serve the public, it does serve its members, who in turn serve the public.

Incidentally, it is to be remembered that the Associated Press communicates not only with itself but with its members, and the

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dealings between the corporation and its shareholders are not to be regarded as dealings by the corporation with itself.

Moreover, there are a number of cases which hold that, even where a person is engaged solely in dealing with himself, he is within the scope of the regulatory power of Congress under the commerce clause. A good example is furnished by *United States* v. *Simpson* (252 U. S. 465), where an individual carrying for his own purposes, for his own consumption, in his own automobile, intoxicating liquor, was held to be within the scope of the regulatory power of Congress.

Moreover, there are the well-known *Pipe Line Cases* (234 U. S. 548), in which the petitioner's counsel, when he was the learned Solicitor General, made the point that there could be no question at all that a person engaged in transporting his own goods in interstate commerce was subject to the regulatory power of Congress, and this Court agreed with his contention advanced in that case.

It being clear that the petitioner's principal business is interstate commerce, I come to the question whether the petitioner's editorial employees in New York are within the scope of the act.

As I have pointed out, these employees sometimes receive directly over the telephone the news as it comes in. If Your Honors will turn to page 189 of the record you will see that this very employee received over the long-distance telephone from New Jersey at various times messages in interstate commerce. He was clearly in interstate commerce at that time. Also he was at various times a filing editor, and, although the petitioner's counsel has compared these editorial employees to persons who work in a steel mill or persons who work in a textile mill, I think the analogy is not sound. If a filing editor is not *sui generis*, he resembles more closely the man who dispatches freight and determines how much baggage shall go on a train, rather than resembling a factory worker, for his duty, as the record plainly shows at page 119, is to determine how much shall go over the line and to keep the line balanced, which is very closely analogous to the work which the train dispatcher or baggage dispatcher performs.

Not only are these employees often themselves in commerce, but they are constantly about commerce. If they were to cease their work there could be no question at all that there would be an instantaneous dam to the flow of business, as the lower court phrased it. It seems to us clear that there can be no question that these employees with respect to this company are much closer to commerce than the stenographers, janitors, and filing clerks, who were held in the *Texas and New Orleans case* to be within the scope of the commerce power.

But even if these employees are not regarded as themselves in or about commerce, we submit that they stand at the heart, or at the very nerve center, of a well-defined stream or flow of commerce.

Petitioner's counsel has suggested that the flow of commerce theory does not apply, for a number of different reasons, to which I shall briefly advert.

First of all, it has been suggested, perhaps not very directly, that the flow, if it exists, stops at the teletype machine. There is a decision in this Court to the contrary. In *Western Union Telegraph Co.* v. *Foster* (247 U. S. 105), it was determined that ticker symbols, which at that time were sent by Morse code, did not cease to be in the flow of commerce while they were being translated from ticker symbols into the English language, and that the flow continued. Hence we

say that the flow does not stop here at the teletype machine but continues.

It has been suggested also that the flow stops because there is a likelihood or a possibility that during this process the filing editor will kill the news—by a "kill-hook" which the petitioner's counsel referred to as a "lethal instrument operating in a mortuary fashion". If there were anything in the doctrine of lethal instruments of a mortuary character, *Stafford* v. *Wallace* called for its application, for there little pigs were slaughtered by butchers' knives and turned into sausages, and nonetheless this Court held the flow of commerce did not stop.

It also has been suggested by the petitioner that the flow of commerce does not include a case in which a man's own goods are being carried; that the flow of commerce applies only where somebody else's goods are passing through some public market.

In the case of *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), that very contention was made, and this Court at page 453 applied the flow of commerce analogy to the case of a man selling his own goods, trade-marked goods.

Finally, it is suggested that the flow of commerce theory applies only where goods or services or information pass through a single focal point, and so does not apply to this "broken down, decentralized system." That is, the petitioner says that the flow of commerce doctrine cannot properly be applied, because there is no single focal point through which everything passes.

But this Court well knows that the Packers and Stockyards Act has been applied not merely at Chicago but at St. Joe and Kansas City, and would be applied at any other market, whether located in Chicago or some other focal point.

It being our contention that the petitioner, with respect to its editorial employee, is within the terms of the statute, I turn to the first major constitutional inquiry: Is the statute as here applied a reasonable regulation of commerce?

Your Honors will recall that there is involved in this case only the first and third of the unfair labor practices. Those unfair labor practices are intended, if I may refer to them in summary fashion, to protect freedom of association and freedom of representation. They do not go beyond that. They are not intended to fix wages, hours, or other substantive working conditions. It may be true, and it is certainly the hope of Congress, that people once allowed freedom of association and freedom of representation will be able to agree upon wages, hours, and working conditions voluntarily and apart from any congressional or legislative edict; but the statute itself does not fix substantive working conditions.

In considering whether or not this regulation reasonably relates to commerce I shall advance three propositions:

First, that history, expert judgment, and common experience teach us that many labor disputes will be avoided if freedom of association and freedom of representation are allowed.

My second proposition will be that freedom of association and freedom of organization and representation have been recognized as a matter of law as having a reasonable relation to commerce; where, as here, the parties are engaged in commerce.

And my third proposition will be that what is a reasonable regulation of commerce does not cease to be reasonable because it does not cover all the conceivable causes of industrial strife.

Now, as to the first proposition, the question of history, expert judgment, and common experience: It has long been recognized that one of the most important causes of labor disputes in this country is the denial by employers to employees of the right to organize and to adopt the procedure of collective bargaining. Several dramatic instances are stated in our brief. I shall refer to only two of them.

In 1918 the telegraph employees were denied by one of the principal telegraph lines of this country the right freely to associate and freely to select their own representatives. The situation was so serious that in April 1918 the President, acting under his wartime powers, found it necessary to take over the communication systems of this country.

Moreover, the most famous—or perhaps notorious—dispute in the history of this country, the dispute which culminated in the *Debs case* (158 U. S. 564), the Pullman dispute, was caused by the discharge of five employees who came to see the management with respect to grievances and merely asked the privilege of being heard.

More important than these dramatic instances is the evidence furnished by statistics. If Your Honors will turn to the last page of the brief, page 144, you will see that in the last two decades between 20 and 50 percent of all of the labor disputes in this country have been caused by these organization difficulties, and what is true of the country generally is particularly true of the commerce in news, as is shown by this record at page 342.

Although this difficulty in labor relations has long been recognized, there have been relatively few steps taken with respect to it. The most important, of course, is the Railway Labor Act which has been described fully at the bar of this Court in the last 2 days. I am not going to go over all the railway acts from 1888 to the 1934 amendments to the Railway Labor Act. It will be sufficient for me to remind you of what was said at the bar of this Court yesterday and the day before, that under the procedure set up under the Railway Labor Act there was not in the fiscal year 1935 a single strike on the railroads of this country, and in the year 1936 the only strike involved less than 30 people. That is not because the railroads were immune from the general economic difficulties which existed throughout the country and throughout commerce. If Your Honors will turn to page 58 of our brief you will find that at the very time when peace was existing on the railroads of this country there was a succession of strikes in maritime and other forms of transportation.

The application of the principles of freedom of organization, freedom of association, freedom of representation, has been consistently recommended by every commission of inquiry which has considered the problem.

In 1898 a commission appointed by Congress recommended that those rights should be preserved. After 1898 there were several commissions dealing with special subjects, anthracite and steel. In 1912 another general commission was set up by Congress; again Congress recommended that freedom of association and freedom of representation be protected.

More recently, in 1934, a Federal commission of inquiry headed by Governor Winant has recommended the same course, and a special report prepared by experts engaged by the Commonwealth Fund have come to the same conclusion.

These principles have been and can be applied outside of the railroad industry. Your Honors will recall that during the period of the war the National War Labor Board, acting under the co-chairmanship of Chief Justice, then Mr. Taft, and Frank P. Walsh, applied these principles.

More recently, in 1933 and 1935, these principles were applied by the National Labor Board under the chairmanship of Senator Wagner and including in its membership people such as Walter Teagle, Pierre du Pont, Louis Kirstein, and Gerard Swope, as well as various other industrial and labor leaders.

But it is said that these principles, though reasonable, bear no reasonable relation to commerce. We answer that the decisions in this Court are to the contrary, and we point specifically to a case not yet 7 years old, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548).

Now, it has sometimes been said that this case may be distinguished because freedom of association and freedom of representation were there protected in order that the arbitration might be carried on. The opinion of this Court does not rest on so narrow a basis. The opinion points out at page 570 that the object of the act is to facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.

There are several ways of amicable adjustment, not only in general but in the Railway Labor Act. There is not merely arbitration. There is mediation. There is collective bargaining. There is the mere elimination of discriminatory practices.

This Court apparently was aware that there was more than arbitration in the act, for at page 567 it referred to "amicable adjustments and voluntary arbitration", and at page 570 it referred at various times to the purpose of the act with respect to "negotiation."

Moreover, in a passage on page 570 it is also pointed out that for a long time employees have had the right to self organization and to collective bargaining, and it is said in the opinion of the Court that Congress was not required to ignore that right but might safeguard it. Hence this Court recognized that freedom of association and freedom of representation had a bearing on other things than mere arbitration.

It has also sometimes been suggested that the *Texas & New Orleans case* rested on the narrow ground that there was an actual dispute. In fact, there was no actual dispute. An examination of the record makes that clear. And an examination of the opinion of this Court makes it clear that your Honors were talking about threatened disputes no less than about actual disputes.

But the petitioner says, regardless of what the *Texas & New Orleans case* holds, the principle there applied may not be applied to an enterprise which does not hold itself out to serve the public and to an enterprise which is not engaged in the functions of an instrumentality of commerce.

We submit that the question whether or not the enterprise serves the public is entirely irrelevant. That is shown by the *Brooklyn Terminal case*, to which I have already referred, in which the hours of service act was applied on the theory, as this Court pointed out, that

the evil is the same whether the commerce be the commerce of the general public or the commerce of a few enterprises or the commerce of a single company.

The second point, that the Railway Labor Act and the principles therein embodied cannot be applied unless the enterprise is an instrumentality of commerce, is to ignore the reasoning which, from the time of *Gibbons* v. *Ogden* (9 Wheat. 1) to the present time, has been followed by this Court in subjecting instrumentalities of commerce to the power of Congress.

The reasoning of this Court has been, we submit, as follows: Congress has the power to prevent commerce from interruptions. An interruption of an instrumentality of commerce would interrupt commerce. Hence Congress has the power to protect the instrumentalities of commerce from being interrupted.

The power which existed in the *Texas & New Orleans case* is derived from a power to regulate commerce generally, as well as the instrumentalities of commerce, and there is no logical or other support for the position advocated by the petitioner that what bears a reasonable relation to instrumentalities of commerce does not bear a reasonable relation to commerce itself. I am not talking, of course, about the questions which arise under the due-process clause, which may be entirely different. I am discussing merely the question whether this sort of regulation bears a reasonable relation to commerce.

My third proposition is that what bears a reasonable relation to commerce does not cease to bear a reasonable relation to commerce merely because it does not go further and cover other evils than those embraced in the statute.

Now, it has been suggested by the petitioner that this statute is defective in its relation to commerce on the ground that it covers only employer practices and on the ground that it does not outlaw strikes.

We submit that Congress can deal with some causes of an evil without dealing with all causes of an evil, and that experience apparently justified Congress in finding that interferences by employers with employees' freedom of association and freedom of representation occurred more frequently than interference by employees with employers' freedom of association and freedom of representation. The fact that the statute did not cover employee practices therefore was justifiable on the basis of the experience shown before congressional committees.

The point is also made that the statute is defective because it does not outlaw strikes, that is, does not outlaw the industrial strife itself, but merely deals with the causes thereof.

Every preventive statute deals with the causes and not with the evil itself. That is the meaning of a preventive statute, and no one has suggested that the Packers and Stockyards Act is bad because it does not outlaw monopoly but merely eliminates the practices which are likely to lead to monopoly.

So here, this statute is not bad because it does not outlaw strikes, if it eliminates some of the causes thereof.

Before I pass to my next general subject I want to say one general word in addition to the three propositions to which I have already referred.

Several times I have emphasized the fact that in this statute Congress is not governing the substantive terms of the employment contract. It is not determining hours, wages, or working conditions. Congress believes that those matters can be determined by self-government, and in order to protect self-government it has established the principles of freedom of association and freedom of representation. There seems nothing unreasonable in the belief on the part of Congress that working men freely allowed to associate and freely allowed to select their representatives will choose, no less than employers will choose, to protect the free flow of commerce which is their common interest. Freedom of association and freedom of representation will beget responsibility, and free people acting through responsible leaders will choose peace in commerce no less than in the world at large.

I turn now to the next major field of inquiry; that is, whether this statute, if applicable to the petitioner is nonetheless invalid because it cannot be applied to other situations, either at the bar or in the imagination of counsel. Of course, the statute has in section 15 the usual separability clause, which establishes the presumption, though nothing more, in favor of its separability.

I draw attention to the fact that the five circuit courts of appeal, before whom this matter has been brought, have all agreed that the statute is separable and capable of application in some, if not in all, situations.

Moreover, it was well known to Congress, to the Executive, and to this administrative board, that the statute would be applicable in some and not in all situations. The Senate committee pointed out that the exact ambit of the statute would have to be marked by judicial decisions. The Chief Executive, in approving the statute on the 5th of July 1935, emphasized the fact that this act applies only where the practice burdened commerce and was not, as the petitioner has urged, generally applicable.

Moreover, the Board itself has known that the statute cannot be universally applied, and there is collected in the footnote on page 116 material from the report of the Board indicating that the Board itself recognizes that the statute has limitations. Whether those limitations in the mind of the Board are the same as in the mind of the Court is not the point here, for the statute uses the very words of this Court in limiting its jurisdiction, and if the Board has erroneously conceived the meaning of the language of this Court, it is subject to appropriate correction.

I think it proper before concluding my branch of the argument to say a word more about the phrase "affecting commerce", as defined in the act; for, though I think in the case at bar it is necessary only to refer to the first clause, that is, that a practice affects commerce when it is in commerce, the petitioner has considered the meaning of the clause generally, and other cases at bar will involve an interpretation of the clause generally.

So, though the first phrase standing alone is enough, and is separable enough, to support this application of the act, I want to say just a word about what the clause may mean in its broader aspects.

"Affecting commerce", as I said to Your Honors yesterday, is defined in the act as meaning "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."

Now, that is the language of this Court, and the question is, What does it mean? We submit that it means first that a practice is within

the power of Congress when it occurs in commerce, and also in three other general situations. Before turning to these situations let me emphasize again that our construction of the statute, whether correct or not, has nothing to do with the validity of the act, which is fundamentally, in our view, constitutional, since it uses the language of this Court. Our construction may be entirely mistaken, but I am merely stating what construction we place upon the language.

We say that a dispute burdens or obstructs commerce if it is a dispute with an intent to affect commerce, or if it is a dispute that has a necessary effect on commerce, or if it is one of a recurring series of disputes which affect commerce.

Now, a word about these three situations. It is well settled by decisions in this Court, including the second *Coronado* case (268 U. S. 295) and the various boycott cases, that industrial strife with an intent to affect commerce is within the control power of Congress. If a practice is being employed in a situation which is going to lead to a strike with an intent to affect commerce, Your Honors have held that Congress has the power to deal with that situation. I don't want to elaborate this point, because it is going to be elaborated in subsequent arguments at the bar. I just want to sketch it very briefly.

We next say that this Court has recognized in a number of different situations that, even where there is no specific intent to affect commerce, if the necessary effect of an industrial dispute is to affect commerce, Congress has power to control the industrial strife. Now what the exact scope of the necessary effect principle is has never been fully elaborated in the decisions of this Court. We have suggested, particularly in the Jones & Laughlin brief, that a necessary effect on commerce exists, or may exist, in any one of three alternative situations: First, where there is a well-defined stream of commerce; second, where the effect of a dispute would be to interrupt a substantial amount of the commerce in a particular commodity; and third, where the effect of a dispute would be to interrupt a substantial volume of goods, whether or not the substantial volume was a substantial part of the total of the commerce in a commodity.

And finally, we suggested in the Jones & Laughlin brief that it is possible that the term "affecting commerce" may be applied to a situation in which it is shown, as it has been shown in the evidence before Congress, that there is a recurring series of industrial disputes which do burden and obstruct commerce.

I turn from that general description of "affecting commerce" back to the facts in this case, and I want particularly to draw the Court's attention to the point that the petitioner did not during the course of his argument refer to, and I submit he was quite proper in not referring to, either the *Carter case* or the *Schechter case*. The problems in those cases are not the problems in the case at bar. This is an enterprise whose principal business is in commerce. It is an enterprise utilizing a practice in connection with employees who are either in or about commerce. This case is ruled by *Texas and New Orleans* against *The Brotherhood of Railway Clerks* so far as the commerce features of the case are concerned, and so the nearest authority in point supports rather than is opposed in any way to the position taken by the Government in this case.

FURTHER ORAL ARGUMENT ON BEHALF OF RESPONDENT

Mr. FAHY. If the Court please, in presenting the argument for the Government on the due-process issue involved in this case I shall not go over the ground covered by Mr. Wyzanski upon the commerce clause, which also bears upon the issue of due process—that is, the real and substantial relation of the regulation to the protection of interstate commerce, the end sought by Congress—but shall go to the other issues raised with respect to the fifth amendment, and that is, Are the means provided by Congress for the accomplishment of its purpose unreasonable, arbitrary, or capricious?

The order in the case at bar was based on the authority of the Board to prevent any one or more of the five unfair labor practices listed in section 8. The particular practices involved in this case are only the first and third of those five practices. For that reason it seems unnecessary to consider the other practices. They have not been invoked with respect to petitioner, the order before the Court is not based on them, and they are separable.

But, if the Court please, in view of the general nature of the attack on grounds of due process made by the petitioner against all of these practices, I shall discuss each of them.

The first practice prohibited by the statute or authorized to be prevented by cease and desist order is a general prohibition in general language against interference, restraint, or coercion of employees in the exercise of the well-known rights set forth in section 7, that is, the right of self-organization, freedom in the choice of representatives for purposes of collective bargaining, and collective bargaining.

The second practice, not involved, however, is this:

> It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

It will be seen that this is but a particularization of a method of interference which no doubt could have been prohibited under the general provisions of the first practice.

And the third listed practice is but another specification by Congress of a method of interference which no doubt could have been prohibited under the general terms of the first practice; that is, discrimination with respect to the hire or tenure of employment or terms of employment, so as to encourage or discourage membership in a labor organization.

As to the first three practices, which lend themselves to joint consideration, we submit that the decision of this Court in the *Texas & New Orleans case* has settled their validity as against any contentions which may be raised under the fifth amendment.

I shall not go into the details of that case, which is so fresh in the Court's mind, but desire merely to point out that there were two questions on the due-process issue necessary to be decided by this Court in the disposition of that litigation: First: Was the general prohibition contained in section 2, third, of the act then under review, against interference, influence, or coercion of employees in their right of self-organization and free choice of representatives, valid? And second: Was the particular conduct which the lower courts had found the railroad had engaged in, such interference, and could it be prohibited notwithstanding the fifth amendment?

Now, the Court upheld the validity of the general prohibition, similar to the first unfair labor practice in this statute. Going to the particular conduct in which the carrier had engaged in that case, we find that it consisted of the discriminatory discharge of five leaders of the brotherhood, the union, because of their activities in connection with that organization, and further, the efforts of the carrier, through various forms of favoritism and sponsorship, to set up and control a rival organization to the brotherhood and substitute it in the place of the brotherhood as the representative of the employees; and the Court held that that conduct constituted interference with the self-organization and freedom of the employees in their choice of representatives, which is exactly the same thing which is prohibited by the second and third unfair labor practices in this act.

Two distinctions have been attempted in the opposing brief in this case to the application of that decision here. It has been said that the requirements of the Court that the discharged employees be reinstated was in order that the carrier could purge itself of contempt for having violated a previously issued injunction, but the Court did not rest its decision upon any such basis, but upon the validity of the act itself, and in its opinion said that the interference found to have occurred by reason of this conduct was interference prohibited by the statute.

The other distinction, which has been mentioned by Mr. Wyzanski and really disposed of, is that the freedom of the representatives protected by the Railway Labor Act was merely for purposes of negotiation before one of the boards created or authorized by that statute, but the Court in its opinion disposed of that by stating that the protection of the right of freedom in the choice of representatives was for the purposes of negotiations between the employees and the carrier, and indeed it was those negotiations directly between the employee and the carrier which was the first line of defense of the statute against industrial strife which would interrupt the continuity of transportation.

But if the question of the validity of these first three practices were to be considered apart from the *Texas & New Orleans case*, it is submitted that they would be held valid when the nature of the rights protected by this statute is considered in relation to the rights claimed to be infringed.

In the earlier case of *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184) this Court said that unions grew up out of the necessity of the situation of the employee; that the individual employee, being ordinarily dependent for his livelihood upon his daily wage, often was obliged to accept a wage which he did not think was fair. So that he joined with his fellow employees in order to leave the employer in a body, in order to seek better terms of employment, and the Court said that the right to combine for such a lawful purpose has not been denied by any court for many years. And of course these principles were strongly reaffirmed in the *Texas & New Orleans case*.

So that the employee has the right to combine to strike or to engage in boycotts; and, on the other hand, the employer has complete freedom of self-organization in the corporate form, in mergers, or in trade associations, and complete freedom in the choice of representatives; and the employer may lock out his employees, lawfully; but lock-outs and strikes and boycotts cause injuries to commerce, and when the commerce is interstate or foreign, the matter becomes one of Federal concern, and has always been so considered.

And so here Congress, in order to avoid the industrial strife incident to the effort to protect these essential liberties of employees, requires that the employer be not permitted to use his overwhelming economic power over the individual employee for one purpose, and one purpose only, and that is, as a weapon to destroy the right of self-organization of the employee or freedom in the choice of his representative. Unless that right may be protected by law there is only the recourse to strike in order that it may be protected by combat.

The principle of protecting these rights has become very firmly embedded in the public policy of the Federal Government, as shown by repeated enactments of Congress. For instance, the Norris-LaGuardia anti-injunction statutes.

Justice SUTHERLAND. The what?

Mr. FAHY. The Norris-LaGuardia anti-injunction statute; the Act for the Coordination of Railroad Transportation, the bankruptcy amendments of 1933 and 1934; and they were restated in the National Industrial Recovery Act.

Going farther back, these same principles were adopted by the War Labor Board as the working conditions of industry during the World War; they were used on the railroads at the same time, and were recommended by the various commissions mentioned by Mr. Wyzanski, which made exhaustive studies of the causes and effects of industrial strife and made recommendations for their solution.

The petitioner, however, makes certain specific objections to the provisos to sections 2 and 3 of section 8, particularly the proviso to section 8, third, the so-called closed-shop proviso, which it is contended imposes a closed shop.

It is submitted that petitioner entirely misconstrues the proviso. The closed-shop agreement is a matter of contract. In the first place, it would seem that the only party who could be injured by it would be an employee who claimed that it injured his rights, and not the employer who might enter into the agreement; and the petitioner is not here representing any employee.

In the second place, and perhaps much more important, the proviso does not encourage or foster the closed shop. The closed-shop agreement, being a matter of contract, is valid or invalid in accordance with the law of the State where it is entered into. It is valid in the State of New York, where petitioner does business, and in other States where petitioner operates, and so Congress did not feel called upon to do other than to leave the closed shop where the statute found it; that is, the question of its validity to be determined in accordance, as now, with the law of the State where the contract is entered into.

I should qualify that, however, by saying that there are certain possible limitations placed upon the closed shop by the proviso, instead of any extension or fostering of it, because under the proviso the Board is not precluded from finding discrimination if the closed-shop agreement is entered into with minority employees or with the representatives of employees dominated and controlled by the employer in violation of other provisions of the act; and it is clearly seen that such a closed-shop agreement might be considered the grossest form of discrimination prohibited by 8–3.

Petitioner makes some particular objection also in its oral argument to the proviso to the second unfair labor practice, which is that, subject to rules and regulations, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. That proviso follows the requirement that the employer shall not dominate or interfere with the formation of, or administration of, a labor organization. The reason for the proviso, if the Court please, was simply this: It was not the desire of Congress, of course, to prevent conferences between employers and employees. On the contrary, that was the central purpose of the act. However, the permitting of conferences without loss of pay, on company time, unless this proviso had been inserted, might have been construed to be the contribution of financial support to an organization.

Now, that is all that that proviso means. The fact that the right to confer might be abused occasioned the placing in the act of the right of the Board to subject it to rules and regulations; but no such rules and regulations have been found necessary, and none are in effect, and it would seem the petitioner could not possibly be injured by any nonexisting rule in that respect.

We come now to the fourth unfair labor practice. But petitioner does not attack this provision of the statute, so I need not defend it. It is merely a provision that it shall be an unfair labor practice for an employer to discriminate against or discharge an employee if he testifies before the Board or files a proceeding with the Board; so that it is merely protective to the administration of the remainder of the statute.

That brings us to the fifth and last of the listed practices which may be prevented and around which a great deal of the objections of the petitioner concentrate.

The fifth practice which may be prevented is the refusal of the employer to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). Section 9 (a) provides that in an appropriate bargaining unit where a majority of the employees select representatives they shall be the exclusive representatives of all the employees in that unit for the purposes of collective bargaining.

But this provision is not invoked against the petitioner in this case. The order in this case in no respect rests upon this provision of the statute. It is entirely separable from the other provisions, petitioner is not injured by it, and a decision on its validity would seem clearly unnecessary in the disposition of this case, unless it is so interwoven with the remaining provisions of section 8 that a decision on its constitutionality is necessary as an abstract question of constitutional law.

We submit that is not necessary, for this reason: Each of the unfair labor practices listed in section 8 is a separate means of accomplishing the purpose of Congress to avoid strife and to further collective bargaining. The separability provision of the statute provides that if any provision should be held unconstitutional it shall not affect the validity of the other provisions.

Petitioner's contention that this provision is so interwoven with the remainder that it may not be laid aside in this case amounts to this: Collective bargaining, voluntary collective bargaining, protection of the right of self-organization, and freedom in the choice of representatives for the purposes of collective bargaining, may not be protected unless collective bargaining is made compulsory. Collective bargaining may not be made compulsory. Therefore, collective bargaining, protection against interference with the right of self-organization, and freedom in the choice of representatives may not be validly provided for by Congress.

We submit that that is a wholly untenable position, and if I may refer again to the *Texas and New Orelans case*, that that decision completely disposes of it. For this reason: There was a provision in the Railway Labor Act involved in that case which said that it should be the duty of the employer and the employees to seek settlement of their differences, and yet this Court did not feel called upon in that case to decide whether that was a legally enforceable obligation, or, in other words, that it compelled collective bargaining as a matter of law; and yet the Court did not hesitate to decide that it was valid to protect the right of self-organization and freedom in the choice of representatives.

In its brief petitioner raises certain objections by reason of the seventh amendment, which go to the provision of the order requiring the petitioner to make whole the discharged employee for his loss of pay suffered by reason of his discriminatory discharge, and the petitioner says that the seventh amendment compels a trial by jury in such a situation.

The seventh amendment protects the right of trial by jury only in actions known to the common law. Obviously, this is not an action at common law. Here is a special statutory procedure to protect rights unknown to the common law. There is no private right here, in the discharged employee, for wages or damages. There is no right of action, even by the Government against the employer, for damages or penalty. Here is a public right enforced to protect interstate commerce, enforced by cease-and-desist orders. The provision supplementary to this equitable remedy of cease-and-desist order permitting the restoration of the status quo is no more than was permitted by this Court in the injunction sustained in the Texas and New Orleans decision requiring such restoration of the status quo, and this affirmative action required of petitioner is purely supplementary to restore a status disturbed by the wrongful act which was at the basis of the cease-and-desist order.

If the Court please, may I inquire as to my time?

The CHIEF JUSTICE. You have now had on your side an hour and 27 minutes.

Mr. FAHY. Before taking up the question raised by reason of the first amendment, I desire to refer to several other general criticisms made by petitioner as to the statute.

Counsel yesterday criticized the provisions of section 9 (b) as being an unlawful delegation of authority to the Board. I should perhaps go into some little detail as to section 9 in its relation to section 8 (5), also bearing upon the question whether or not this Court need in this case decide anything with respect to section 8 (5).

Before section 8 (5) comes into operation at all a number of occurrences must transpire, and the method of working these out under the statute is contained in section 9. Collective bargaining, of course, must be carried on through representatives. All of petitioner's employees could not wait upon him together. So this statute provides in section 9

that where controversy arises as to the representatives a hearing on petition, as provided in the rules and regulations of the Board, may be had, and of course it is necessary in determining the choice of representatives that there be some bargaining unit, which really goes to the question of the eligibility of those who may participate in the designation of the representatives.

So a hearing may be had on that question, and the employer as well as the employee is entitled to participate and reserve all their legal rights for review by the courts. That hearing goes to the question of the appropriateness of a particular unit as a bargaining unit and the question of who, if anyone, are the representatives, which may make it necessary to hold an election, which is permitted under this section, and if the majority in the election designate representatives then those representatives become the representatives of all in that unit.

But before any proceedings could arise under section 8 (5) those representatives must seek to bargain with the employer, and they must be refused that right, and then, if so advised, they may file a charge with the Board of an unfair labor practice under 8 (5). Then the Board may issue a complaint and a notice of hearing, and then there would be a hearing on the question of whether 8 (5) had been violated, and the Board perhaps, determined by what occurred at the hearing and by the testimony, might issue a cease-and-desist order.

Now, during all of those proceedings, including those involving the appropriateness of the unit and the election or designation of representatives, the petitioner would have the right to reserve all possible legal objections, and before any enforceable obligation came about he could have a review by an appropriate circuit court of appeals, and in its discretion by this court, to determine whether or not during any of these proceedings any rights of petitioner had been infringed.

It would seem clear that in permitting the Board, on notice and hearing and the taking of testimony, to determine the appropriateness of the unit constitutes no unlawful delegation of any authority, but is the kind of proceedings which this court in the *Schechter case* referred to as "appropriate" when it compared the procedure, like this, of the Federal Trade Commission, with that of the National Industrial Recovery Act.

Petitioner finally contends that certain provisions of the order violate its rights protected by the first amendment and infringe the freedom of the press. As I understand petitioner's contention in that regard, it is that the provision of the order supplementary to the cease-and-desist order, requiring the restoration to employment, or the offer of reinstatement of employment to the discharged employee, violates the freedom of the press.

Now, if the court please, what is the freedom of the press, in its broadest possible definition? It is the freedom of the circulation of news and the freedom of expression of news the petitioner may desire and in any manner in which it may desire to express it. It is submitted that this statute is not concerned with and does not affect that freedom in any respect.

Petitioner does not contend, as I understand it, that the first amendment lifts the commerce clause from petitioner or that a valid regulation of interstate commerce, of general application in the field of interstate commerce, may not be applied to it, but it does contend

that under this order the requirement of restoration of the discharged employee is a particular application of this statute which violates the freedom of the press.

The statute, obviously, has no special application to the petitioner, and so its position amounts to this, that Watson was disqualified, or is now disqualified, from performing his duties in such a manner as would permit the petitioner the fullest freedom of the press—that is, the expression of the news as it might desire to express it.

But the difficulty with that contention with respect to the order before the Court is this: Watson was not discharged for any reason having to do with the expression of news or the circulation of news. It is an established fact in this case, as pointed out by Mr. Wyzanski, that Watson was discharged because he engaged in activities in connection with the Guild, and the immediate cause of his discharge was his efforts to obtain collective bargaining with petitioner.

Now, what has that to do with the freedom of the petitioner to express the news entirely as he may desire to do so, or to deliver the news in any manner which it may desire?

If petitioner's contention is that, since the record in this case was made, Watson has become biased or undesirable, then he need not retain Watson. The order of restoration, of course, gives no continuing status to the employee, and it is not possible by any provision of this act to give status of that sort to any employee. The provision of restoration is merely to restore a status disturbed for reasons proved in this record, which have nothing to do with the man's qualifications or the desire of the petitioner to express the news in any manner which it desired.

Petitioner argues in its brief in this connection that it has not been found by the Board that the employee is now qualified to do the work which he was performing; but, if the Court please, he presumably was qualified to do that work at the time he was discharged. The petitioner had placed him there. He was not discharged for inefficiency or for any other reason than that found by the Board. So in ordering him now to be restored on the basis of the record the order merely places the man where the petitioner had placed him and from which place the petitioner had removed him merely because of his Guild activities, and if it is now found that he is biased or disqualified in any way he need not be retained so far as any provision of this act is concerned, or of this order.

It seems that in the last analysis petitioner's argument based on freedom of the press amounts to the contention that it must be conclusively presumed that mere membership in a labor organization disqualifies the person from expressing the news in the manner which petitioner desires. And yet petitioner itself has answered this contention in its own brief by pointing out, indeed boasting, that it has many Guild members among its employees.

The sum and substance of it is, if the Court please, that the right of self-organization and collective bargaining simply has no relation whatsoever to the freedom of the press or the infringement of the freedom of the press. Here is a man named Morris Watson working for the petitioner. He is a capable employee. The record proves it. He was one of their star men who was brought in from Chicago to New York because one of the officers, one of his superiors, knew the quality of his work and wanted him in the New York office. He had

been working for the Associated Press for some 7 years. He had been given the most important assignments, and he had faithfully discharged his duties to his employer. But he was one of the men who thought that he had the right to associate with his fellow employees in the Guild, and the petitioner did not like this, and, though he had fully performed his duties and been complimented, and was entirely satisfactory to the petitioner so far as the quality or nature of his work was concerned, he was discharged for the sole reason that he had engaged in these organization activities.

Now, what has that to do with the freedom of the press? The freedom of the press is indeed a great freedom, and Watson and the Guild to which he belongs will fight as long and as hard for its maintenance as the petitioner will. Under the first amendment the petitioner exercises the greatest freedom, and it should, and it exercises great freedom in other respects in the conduct of its vast operations. It has the freedom of the seas in the collection and dissemination of the news, and of the land, and of the air, and now even of the ether, and it is submitted that petitioner may not raise the first amendment as a shield behind which it may claim the right to stand protected while it stifles the freedom of the individual employee to associate with his fellow employees for mutual aid and protection; that this is a right which Congress may protect in such a statute as this, and by so doing protect petitioner in its far-flung international and interstate enterprise from the interruption through industrial strife which follows upon the denial of these essential liberties of employees.

What is the liberty which petitioner claims here? This statute imposes no terms of employment, it fixes no wages, it makes no agreements, it imposes no employee upon any one, except as a supplementary enforcement measure, supplementary to a cease and desist order to right a wrong ab initio which has occurred in violation of the statute.

The liberty claimed by the petitioner is really not the liberty that the Constitution protects against invasion; it is the liberty to interfere with and coerce and restrain others in the exercise of liberties which this Court has long recognized and characterized as essential. And all that the employer is asked to do under this statute, should the Court, after full judicial review, approve any particular order made under its terms, is to restrain the full and absolute exercise of its liberty so that by its side there may exist these essential liberties of the employees too; and this is done under this statute under the strong power of Congress under the commerce clause to regulate interstate commerce. With the power to regulate it goes the responsibility of adopting reasonable means to protect it, and it has been found and it cannot be controverted, and it is not controverted, that the denial of these essential liberties leads to burdens and obstructions to interstate commerce.

May those burdens and obstructions be prevented by the law, by the protection that this Court afforded under the railroad legislation, to these liberties of the employees, so that the controversy over them may cease to be the causes of these recurrent and ever-devastating obstructions to commerce? If that may not be done, are we faced with the situation that these rights must go on being fought for through industrial strife? That is the alternative, because, as this

Court has said, the rights are essential. They cannot be abandoned. They are necessary. They have long been recognized.

May they be protected by law, or must the employees be left to the protection of them only through industrial controversy leading to the burdens and obstructions to commerce which this statute seeks to avoid?

It is submitted that when the separate provisions of the statute itself are analyzed it will be found that they are reasonable, that they are not arbitrary or capricious, that they go no further than is reasonably necessary to accomplish the purpose of Congress, that they place no undue limitation upon the full freedom of the employer, and that the statute emerges as a reasonably well designed plan to afford the protection to interstate commerce which it was the object of Congress to achieve.

It is respectfully submitted that the circuit court, in the reasons that it gave for sustaining the order in this case, and in its decree sustaining the order, was correct, and its decree should be affirmed.

ORAL ARGUMENT IN REBUTTAL IN BEHALF OF PETITIONER

Mr. DAVIS. If the Court please, in view of the arguments which are to follow, I shall make my reply to counsel of the very briefest sort.

My brother Fahy expresses disappointment that in the course of my argument I did not dilate on the *Carter* and the *Schechter cases*. All I have to say on that subject is that I have never found it helpful to utilize the time of this Court in reminding it of its own decisions, particularly decisions that are so recent in time and so thoroughly considered as are those. I leave that function to the brief, and the opinion is expressed in our brief in words too plain to be misunderstood, although there may be disagreement with them, that the reasoning of the *Carter* and the *Schechter cases* dooms this statute beyond all reasonable hope of recovery.

In the *Carter case* Your Honors differentiated the "throat" cases and the strike cases and the transportation cases in a manner to which I have nothing now to add.

Now my brother says that our objection to section 3 of paragraph 3 of section 8 of the act is that it forces closed shops, whereas, says he, it does nothing of the sort. While we believe that the closed shop is the intended result of that section and of this act, we make no pretention that the act in turn renders the closed shop mandatory. But our objection to section 3 is that it is on its face arbitrary and unreasonable, because by its language it forbids discrimination against employees because of their membership in a union, and countenances and encourages discrimination against them because of their nonmembership in the union. That is the term and language of the third section and its proviso, and a statute which draws a distinction between the rights of men based simply upon membership or nonmembership in a labor union is by its terms arbitrary and unreasonable under the fifth amendment to the Constitution.

My brothers have said, so far as the freedom of the press is concerned, that our contention here is that the first amendment lifts from the back of the press the power of Congress to regulate commerce, and my answer to that is that, so far as the power of Congress to

138858—37——7

regulate commerce embraces the freedom of the press, the first amendment not only lifts it, it abolishes it, because the power to regulate commerce, like every other power granted in the Constitution, must be exercised and can only be exercised within the limitation of the Bill of Rights, and whenever Congress, under the guise of the regulation of commerce, undertakes to impair the freedom of the press, it is met at the gate by that constitutional immunity, and it dare not advance a step further. That is our contention here.

Mr. Fahy says that the question is one of the qualification or disqualification of Watson, which, as I tried to make clear yesterday, in our opinion, has nothing whatever to do with the case. He may have a heart as pure as Galahad and be as wise as Solomon, but if he is forced upon us by law to formulate and write what we must publish, we are no longer free insofar as the outgivings of the Associated Press are concerned.

If that may not be done, that you cannot, as I undertook to make clear yesterday, our point of view, cannot separate the author from the thing he writes, and if the law may say to the newspaper publisher, "You shall employ this, that, or the other person to compose your output" the law has effectively controlled the output at its very source.

It is suggested that there is no forcing of an employee on us here. What is the language or meaning of this order? It is that you must take this man back, and take him back for exactly the purposes and uses, and functions and position that he occupied at the moment of his discharge. Now, of course, he is left free to come or not, as he pleases. We are required to offer him that employment and he may come back as a vindicated martyr; or he may stand out as one too proud to return to the place of his disaster. But so far as we are concerned, our option in the matter, according to this order, is at an end; and we must accept him at the hands of the National Labor Board, no matter what our opinion may be about his capacity, his impartiality, or his continued loyalty. The Constitution does not say that Congress shall pass no law impairing the partial freedom of the press. It does not say that Congress may pass a law which will affect a portion of the functions of the press. It says that the press shall be free to furnish to a democracy the only pabulum upon which democratic opinion can feed.

(Whereupon oral argument in this cause was concluded at 1:45 p. m.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 469

WASHINGTON, VIRGINIA & MARYLAND COACH CO., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ORAL ARGUMENT

WASHINGTON, D. C.,
Wednesday, February 10, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 1:45 p. m.

Appearances:

On behalf of the petitioner: Mr. Robert E. Lynch, and Mr. William J. Hughes, Jr.

On behalf of the respondent: Hon. Stanley Reed, Solicitor General of the United States. Mr. Charles Fahy, General counsel, National Labor Relations Board.

The CHIEF JUSTICE. No. 469, Washington, Virginia & Maryland Coach Co. against the National Labor Relations Board.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. LYNCH. May it please the Court, this case is here from a decree of the Fourth Circuit Court of Appeals, which ordered the petitioner here to put in force and effect and to operate under the order of the National Labor Relations Board.

That Board in March 1936 held a hearing, which hearing was the result of a charge and complaint which had been filed against the company, the Washington, Virginia & Maryland Coach Co., by a local labor union, or branch of a local labor union.

The complaint was issued as a result of the charges, and the petitioner here filed an answer and raised certain constitutional points, jurisdictional points, and the answer was filed and the hearing was had.

After the first hearing, which was held before one of the members of the Board, Mr. Carmody, approximately a month later we had a notice of another hearing, which was held before a different member of the Board, and we responded, and additional testimony was taken; and a third hearing was also held, additional testimony being taken each time.

Thereafter the Board rendered its findings and conclusions and held that the respondent had violated sections 1 and 3 of section 8 of the act. Those provisions are that they "interfered with and restrained or coerced employees in the exercise of their right guaranteed in section 7", which is the right to organize, and so on; and the third one is, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Justice BRANDEIS. Mr. Lynch, would you state very briefly the main facts out of which this controversy arose?

Mr. LYNCH. Yes, sir. This company, as distinguished from the Associated Press Co., is probably one of the smallest and most insignificant there is in the country. It has no power. It runs busses from Washington over into the nearby counties in Virginia in the morning and they return the people in the evening who live over there, mostly Government employees.

It has been in business approximately 10 years, starting with originally 9 busses and approximately 20 employees, and at the present time it has 50 busses and approximately 80 employees.

The principal place of business of the company is located in Clarendon, Va., just a few miles the other side of the river, where it has an office consisting of one room divided into two parts, and a garage immediately to the rear thereof, where it services busses.

The busses run principally between Arlington County and Washington. One goes to Fairfax County, if I recall correctly. One originally went to Winchester, but it has been discontinued at the present time. So the furthest extent is approximately 18 miles to Fairfax Court House. They bring the people into Washington in the morning and take them back in the evening.

The charge was that the petitioner here, the company, had discharged 21 employees, some drivers, some garage workers, and some mechanics, because of their connection with and membership in Local 1079 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees Union. The company denied this.

The facts were these, that—or rather there were two things going on at the same time, if I may put it that way. First we have from the union standpoint a man named Griffin coming in the employ under the guise of a mechanic in the winter of 1935 and '36. He was the one who first discussed with them the advisability of a union. After talking with the foreman and other persons there he left.

The next that appeared on the scene is the fourth vice president of this international union, one Clark, who consults with the foreman of the shop and others in the shop on the advisability of a union. There are conferences held during the first part of the year 1936, culminating in an organization meeting on the 24th day of February 1936. Clark, by the way, held some of the conferences at night there when the president was away in the president's office during the company time.

The organization meeting was on the 24th of February. Their charter was received on the 3d of March. The discharges occurred on the 3d, 4th, and 6th of March. The company learned of the existence of a union on the 27th day of February, 3 days after the organization meeting. That information came to its active manager, Mr. England. At the terminal one of the drivers asked him "What about the union?" Or what the company was going to do about it, and he said he never heard of it before, and then asked him what he did about it, and he said, "I didn't do anything about it. I had a date to go to the wrestling matches, and I went to the wrestling matches." So he did not regard it was important. This company, at the same time these union activities were going on, from their viewpoint they were doing this: They had, commencing with the latter part of 1935, an increasing number of complaints, as testified to by the president, who was active in the company and the sole owner practically, and the organizer of it, and a pioneer in the bus industry; England, the manager at the plant, and also at the terminal G. Wilsey, the superintendent at the shop. They testified in great detail as witnesses for the Board that over a period of months there was a growing inefficiency among the drivers and the mechanics.

Now the road calls—that is, the calls that the shop people had to go out and repair a bus, which they called a road call—they had increased to a point where in 15 days, from February 15 to March 1—for the time when this union was active—they had reached the amount of 61, which was the highest——

Justice VAN DEVANTER. Sixty-one what?

Mr. LYNCH. Road calls.

Justice VAN DEVANTER. Sixty-one in number?

Mr. LYNCH. Sixty-one in number, yes, Your Honor. This was true in spite of the fact that they had put on in recent years a great deal of new equipment, and they had discarded some of the old ones.

There was also some evidence in regard to the drivers, each one of them separately, which I will come to in a few moments.

Justice MCREYNOLDS. Are you undertaking to show that there was no evidence to support the conclusion of the Board?

Mr. LYNCH. We take the position, Mr. Justice, that the findings and conclusions of the Board were erroneous.

Justice MCREYNOLDS. Do you think there is evidence to sustain it?

Mr. LYNCH. We think there is; yes, sir. We think there is, and we cite some cases in our briefs which we feel sustain us on that point. The court below, the fourth circuit, did not view the evidence as we did.

The CHIEF JUSTICE. This was not a case where the employment of these men in interstate commerce was in question?

Mr. LYNCH. That was not involved; no, sir.

The CHIEF JUSTICE. They were in interstate commerce?

Mr. LYNCH. That is right.

The CHIEF JUSTICE. On that aspect, if the act of Congress was a constitutional act, the matter of ascertaining the particular facts was left to the Board, and it made its findings upon evidence, and the Congress has said that its findings made upon evidence shall be conclusive. So what is the ground upon which you appear here? You are not here with any constitutional right on that aspect of the case?

Mr. LYNCH. We think we have a constitutional right to hire and discharge the people and conduct our business in our own way, petitioner has, and under the decision of this Court in *Crowell* v. *Benson* (285 U. S. 22) and also under the decision in *St. Joseph Stock Yards Co.* v. *United States* (298 U. S. 38), we feel that we do have that right.

Justice MCREYNOLDS. And you feel that you are in a position to ask us to decide whether you can discharge them as you see fit?

Mr. LYNCH. Yes, we think so, because I will show you in a few moments.

Justice McREYNOLDS. I am just trying to get your theory. You are asking us to pass on that as an original question?

Mr. LYNCH. Yes, sir; or else reverse it and have the fourth circuit pass on it. In other words, we feel that we have a right to have some judicial tribunal determine the facts in the case, where these people are required to reinstate these people they do not want to employ and to put them to work and to pay them all their back salary from the time they went away from work.

The CHIEF JUSTICE. Upon the question of whether Congress has a constitutional right to provide for the regulation of transactions in interstate commerce that is here provided, if it has that constitutional right and the employees are in interstate commerce, and if the act applies to them and the facts necessary to be determined have been determined upon evidence, what position are you in in arguing facts to us in regard to the basis of the charge?

Mr. LYNCH. We think, may it please the Court, that in many instances the Board did not follow the evidence at all, and I hope to show that in some instances their findings were not based upon any evidence, and they have taken, for instance, their own witnesses, such as England——

The CHIEF JUSTICE. You say in some cases. You mean in this case?

Mr. LYNCH. In this case, in some respects.

The CHIEF JUSTICE. The court of appeals has said that their findings were upon evidence. You say there was no evidence to support the findings?

Mr. LYNCH. We say that there was no evidence to support certain of these findings.

The CHIEF JUSTICE. That their findings were erroneous by not being based upon evidence?

Mr. LYNCH. In part, yes; and we also say that, and we hope that the Court will follow that view, under those decisions I have just referred to we will have the right in some judicial tribunal to have the court consider the evidence in full and give its own estimate of what it believes the evidence to be.

Now, for instance, probably at the very outset let me say this: The trial examiner in this case was Mr. Carmody. He was a member of the Board, and during the hearing this is what he said [reading]:

> You see, I am not a lawyer, and I am disturbed by this business of trying to build a whole case out of evidence, because it is not to me very scientific, and we know—

I don't know whether he meant himself personally or the other members of the Board, but he said—

> we know, those of us who have done management engineering, that we can determine all the evidence that is necessary in a case, not from witnesses, but from factual material that we examine in a research sort of way, and I know that we have got to go through this process of wasting a lot of time, because we are tied in with court procedure. So we go through the process and I endure it as an examiner. But I know that there are many elements that will enter into this, and I think we all know that. So you may have a lot of tall proving to do, and these men may have some questions to ask.

Now, we take if from that statement that he was not going to bother so much about what the witnesses said, but from his "factual research sort of way" that he acquired knowledge which was not in the record.

The CHIEF JUSTICE. You mean that is his mental attitude?

Mr. LYNCH. That was what he said.

The CHIEF JUSTICE. Now, the point is, what evidence did he have? The court of appeals has said that the Board did have evidence, and I understand that your position is that it had none. I will hear you on that, but so far as I am concerned I do not think the authorities that you refer to have any relation to a case of this kind. One was a jurisdictional case; the other was a confiscation case. If this act is constitutional, then the question is whether there was evidence to support the action of the Board acting under the act and in accordance with its terms.

Mr. LYNCH. There was some evidence—I will say this—for instance, there were some witnesses, these discharged employees, who said "I was told that I was discharged by reason of my connection with the union." Now, that certainly is some evidence. But we say that the great overwhelming evidence was to the contrary and that there should be something more than an impartial labor board that hears the evidence and determines it. We should have some judicial tribunal that will pass upon it. And if the Court takes the position that I cannot argue it, of course, I won't go into the detail of the evidence, but I am prepared to do it.

For instance, as an example, a great deal of time——

The CHIEF JUSTICE. The hour for recess has arrived.

(Whereupon, at 2 p. m., a recess was taken until 2:30 p. m. of the same day, at which time the oral argument was resumed, as follows:)

The CHIEF JUSTICE. Mr. Lynch, the circuit court of appeals, as I understand it, held in this case that there was evidence to sustain the findings of the Board. You are at liberty, of course, to contest that ruling and endeavor to show to us, if you so desire, that it was erroneous, but if it be granted that there was evidence that the court of appeals found to sustain the findings of the Board, we do not wish to hear you upon the conflict of evidence.

Mr. LYNCH. Well, with that statement of the Court, may it please the Court, Mr. Hughes, who is going to argue the legal points, will proceed.

FURTHER ORAL ARGUMENT ON BEHALF OF THE PETITIONER

Mr. HUGHES. Of course, I would only like to invite the attention of the Court in that respect to the fact that the jurisdiction of the court below was at issue, dependent upon whether the facts in the case showed an unfair labor practice.

The CHIEF JUSTICE. The act of Congress places the duty on the Board of making determination of the facts, and the circuit court of appeals has sustained the finding of the Board on the facts. Now, if you desire to argue the validity of the act of Congress, not with respect to the conflicting evidence upon the facts to which the Board addressed itself, why of course I assume that that will be your effort.

Mr. HUGHES. In that respect, of course, Your Honor, we rely upon the various arguments already made in the series of cases being heard at the present time, in respect to the validity of the act insofar as the fifth amendment is concerned, and the seventh amendment. The question I would like to argue is the sole question of inseparability.

In other words, in the event that this Court should hold that the present act is unconstitutional with respect to intrastate commerce, as we use the word, in other words, in these present companion cases, if this Court should determine that by reason of those cases not involving interstate commerce the act is unconstitutional, I would like to argue the question of whether, in that event, the act is likewise unconstitutional by reason of inseparability in respect of the present admittedly interstate case. Of course, there is no dispute in the present case that the present bus company, the petitioner, is engaged in interstate commerce.

Justice McReynolds. What was the order in the case?

Mr. Hughes. The order was to cease and desist in unfair labor practices and to restore the individuals to duty with back pay.

Justice McReynolds. You discharged some of them?

Mr. Hughes. We discharged 19 or 18 employees at or about the time of the formation of the labor union.

Justice McReynolds. What were they doing?

Mr. Hughes. They were working on the busses. Some were bus drivers; five of them were bus drivers, the remainder of them mechanics.

Justice McReynolds. I am trying to get your case in mind if I can.

Mr. Hughes. Yes, Your Honor.

Justice McReynolds. These people were discharged, and the order did what?

Mr. Hughes. The order compelled us to restore them to duty with back pay.

Justice McReynolds. Do you understand the meaning of that order to be that you are to put them back as drivers on your busses?

Mr. Hughes. That is right.

Justice McReynolds. Is that admitted?

Mr. Hughes. I think it is admitted. That is the meaning of the order. It is perfectly clear. The order itself compels us to restore them to duty and to give them back pay, deducting, I assume, what they made in the meantime in some other employment. In reality, the act says to order them to restoration of duty. Of course, then they compel them to be restored to duty, and that is one of our claims, that the order is entirely unilateral, and while it compels us to restore them it does not compel them to work for us. So that it is outside the scope of the usual concept of duty in that respect, with respect to the personal service contract.

On this question of inseparability I would like first of all to show how the thing arises, because the statute in the present case——

Justice Sutherland. Before you come to that, you say that there are provisions of the statute that apply to interstate commerce and other provisions that apply to intrastate matters?

Mr. Hughes. No; I don't mean to give that impression, Your Honor.

Justice Sutherland. Or is it a question of whether the act when couched in general terms can be properly applied to intrastate matters?

Mr. Hughes. That is precisely the point.

Justice Sutherland. Your case is one that does not involve interstate transportation?

Mr. Hughes. It does.

Justice Sutherland. And the language of the statute covers your case; whether it covers more is another question?

Mr. Hughes. That is true.

Justice Sutherland. Then it is not a question of whether the general language of the statute should be limited to interstate commerce over which Congress has jurisdiction and not extend to intrastate matters?

Mr. Hughes. Well, we claim as to that, Your Honor——

Justice Sutherland. In other words, is it not really a question of separability of the provisions of the statute?

Mr. Hughes. Well, of course, I think all questions of separability can be viewed somewhat conversely, or obliquely, if you want to say it, from the viewpoint of construction.

In other words, if the object of this present act is to achieve something which cannot be achieved unless it is applied to all commerce, intrastate as well as interstate, I say we have the right to argue that, if you should hold that it is inapplicable to ordinary manufacturing companies in the companion cases herein, then I say we have the right to argue whether it is applicable to the interstate bus company that we represent.

The Chief Justice. Is there anything in this act which in terms makes it applicable to intrastate people?

Mr. Hughes. There is nothing in terms which makes it applicable, but the object of the act——

The Chief Justice. If in any case it is held that it applies to a class of employees who are in some intrastate activity, it would have to be because of the effect of that activity upon interstate commerce?

Mr. Hughes. That would be true, but of course——

The Chief Justice. In other words, it would be by the terms of the act applying to what suggests an injury to interstate commerce or the transactions in interstate commerce, and not because the terms of the act applied to intrastate activities as such?

Mr. Hughes. That may be true, but you must accept the definition of "intrastate commerce" as given by the act. In other words, if the act shows on its face that it was intended to apply to what we all colloquially call ordinary manufacturing concerns or industrial concerns located here, there, and everywhere, and if the administrative construction of the act is to apply it to that, you have got to presume that Congress intended the act to apply to intrastate commerce, and then if you should hold that that construction is unwarranted and that Congress had no such right, we say, if the object of the act itself cannot be achieved by applying it to ourselves, then by cutting down the application of the act to ourselves in effect the act is diverted to an entirely different object than the act itself reveals. That is the substance of our argument.

Justice Sutherland. Then under the conclusion that you draw nevertheless it does not include you?

Mr. Hughes. It does include us, but it includes us for an object which is all-inclusive, and it cannot, in the situation we are postulating, achieve——

Justice Sutherland. You say you are relying upon arguments made on behalf of other people. This case has no connection with other people, at all?

Mr. HUGHES. I admit that, Your Honor, but we point to several cases wherein practically the same thing has been held by this Court. For instance, in the *Trade Mark cases* (100 U. S. 82), Your Honors held that the statute that was intended to apply to trade marks, both in intrastate and interstate commerce, could not be applied by judicial exception or excision to interstate commerce, and the reason you said so was because the object of the act was, as you said, to achieve a universal scheme of trade-mark protection.

Now, I say that the present act shows on its face—and I would not like to argue it, because I think it will be better done by the succeeding counsel—but I say the object of this act shows on its face that it was intended to apply everywhere; it had a universal application.

Justice STONE. Is not the act by its terms restricted to employment affecting interstate commerce?

Mr. HUGHES. It is, Your Honor, but, as I say, in respect of that word "affecting" we have got to read into that word "affecting" the interpretation which is contended for by the Government, which is that intrastate cases, for instance the *Jones & Laughlin case*, the manufacture of steel, affects interstate commerce.

And so I say that, if you say that that construction is not warranted, and if you hold that it cannot be made to apply to those cases, we are entitled to argue that it is not intended to apply to the present case.

Justice STONE. Do you think we ought to interpret the act as unconstitutional or simply interpret it to apply only to those employments which affect interstate commerce within the meaning of the Constitution?

Mr. HUGHES. I naturally adhere to Your Honors' decisions, which of course are well founded, to the effect that you ought not to interpret acts of Congress unconstitutional where you can resolve them in such a way as to hold that they are constitutional.

Justice STONE. But they should not be given any more latitude than the Constitution will permit?

Mr. HUGHES. Precisely. But of course, if you take the conflict between the word "affecting" in the definitions and the other objects in the act, as revealed in the preamble, and if the preamble of this act sets forth objects of the act which are to be achieved only through the regimentation of all industry, it does not seem to me that "affecting" can be given the restricted definition Your Honor contends for.

The CHIEF JUSTICE. The preamble merely states, as you put it, objects, and for the purpose of achieving those objects certain definite things are authorized or required, and if those definite things authorized and required are constitutionally authorized and required, would you say that resort should be had to the preamble and objects for the purpose of holding the entire act unconstitutional?

Mr. HUGHES. Well, the difficulty of that, Your Honor, is the fact that the two interact. The preamble affects the definitions, and the definitions affect the preamble. It is an inextricable puzzle to me as to just how to resolve that conflict. But I can only leave these broad and difficult constitutional questions to the Court and say that, in the event that you should come to the conclusion that it is inapplicable to what I call roughly these intrastate cases—and of course it is just a quarrel as to words as to what the meaning of "intrastate cases" is—I refer to these various cases here as intrastate cases, and if Your

Honors should determine that it is inapplicable to those cases, the point that I would like to argue is whether, in that event, it is applicable to the interstate cases such as the present.

Now, the court below passed on the thing, and the question is complicated, which I think should be brought to Your Honors' attention right away, by the method the court passed upon. The question was raised and fully argued below in briefs and in argument, and in its opinion the court said the following in ruling on it [reading]:

> The respondent also attacks the act on the ground that, as construed by the Board, it applies not only to interstate commerce but also to local industry in manufacture and production, and that therefore the whole act falls in spite of the separability provision in section 15.

Now, here is the point that causes the difficulty [reading]:

> There would be some basis for the application of this line of reasoning in the pending case if the Board's construction of the act were tenable and it were reasonable to interpret the act as applying to intrastate as well as interstate activities. But as we have endeavored to show in an opinion filed this day in *Foster Bros. Manufacturing Co.* v. *National Labor Relations Board*, the power conferred upon the Board to prevent unfair labor practices, as set out in section 10 (a) of the act, is restricted to unfair labor practices affecting commerce, and commerce is defined to mean trade, traffic, commerce, or transportation among the several States or with foreign countries. Congress therefore did not intend to regulate intrastate as well as interstate commerce, and there is no ground for the argument that, an important and inseparable part of the act having been condemned, the whole act must fall.

Now, in the Foster Bros. opinion, which in effect is made part of the present opinion on this particular point—and the *Foster Bros. case* was a purely intrastate case as we are using the term here—the court says [reading]:

> It is not the position of the Board that the act applies to all industry or to all employers and employees, but that by its terms it is applicable only where interstate or foreign commerce is subject to substantial interruption from industrial strife arising out of the unfair labor practices which the act prescribes. However, it is contended that when a substantial portion of the raw materials or of the finished products of a manufacturing business move in interstate or foreign commerce, so that the flow thereof will be hampered or obstructed by industrial strife in the factory, Congress has power under the commerce clause to adopt by legislation appropriate methods to eliminate or reduce such industrial strife, on the ground that it constitutes a direct and substantial burden upon such commerce.
>
> In view of this contention, it may be immaterial—

the Court says—

> it may be immaterial whether the question to be now decided is considered to be one of statutory interpretation or of constitutionality. But since it may not be supposed that Congress intended to pass an unconstitutional law, we shall dispose of the case by determining whether the employer was engaged in interstate commerce within the established meaning of the phrase when it did the acts for which it was brought before the Board.

Now, we contend as to that, Your Honors, that if the basis of the decision below was that the act was not intended to apply to what we call the intrastate cases, if Your Honors should determine that it was intended to apply but was unconstitutional in that respect, then we say we have a right to argue that, so applied, the act is unconstitutional by reason of inseparability to the present case.

Now, of course, we are aware of the fact that there is a separability provision in the act, section 15, and that section is entitled to just as much effect as any other section in the act; but of course the difficulty in the present act is that, unlike the act involved in the *Carter Coal Co. case*, the present act has only one object so far as we

can see, the object contended for by the various petitioners herein, and the object which I think is revealed by the object and purpose of the act as revealed by the act itself.

In the *Carter case* there were several objects. There were, first of all, the labor provisions, and secondly, there were the price-fixing provisions. And so you might say that in that case the separability provision would save one where the other was declared unconstitutional.

Justice McREYNOLDS. How can the separability point arise here? There are no separate paragraphs referring to intrastate commerce, are there? They are all together, are they not?

Mr. HUGHES. I concede that, Your Honor; they are all together.

Justice McREYNOLDS. I was trying to follow your argument. The whole act applies to whatever the Court says it is intended to apply to?

Mr. HUGHES. That is true.

Justice McREYNOLDS. And if the Court construes the act as only applicable to interstate commerce, what would there be to separate them?

Mr. HUGHES. Excepting insofar as the apparent object of the act in the definitions is to include in interstate commerce what really is intrastate commerce.

Now, as I say, I don't care whether it is viewed from the viewpoint of unconstitutionality or the intention of Congress, I say that if the object of the act is to achieve the broad results which can only be achieved by applying it to all the little local manufacturing concerns that it really is being applied to in practice at the present moment, and if Your Honors should hold that it is unconstitutional in that respect, then I say that you have got to come to the conclusion that Congress never intended it to apply to the few outlying forms of interstate commerce which remain after you have eliminated all the local concerns.

In other words, I don't think you can interpret this act into a merely internal regulation of bus companies or communication systems. In other words, Congress never intended—there is not a word to show it—this act to do, for instance, for bus companies, what the Railway Labor Act did for the railroads. There was not the slightest attempt to regulate internally the affairs of bus companies, communication systems, or anything of that character. It was just for the purpose of helping them out. The object of this act was bigger and better than that, and I think we might as well confess it in reading it over.

I say that on the basis of the *Trade Mark cases*, and in particular on the basis of *Butts* v. *Merchants & Miner's Transportation Co.* (230 U. S. 126), this Court has recognized the principle that I am now contending for, which is that the object of the act is what governs this Court in determining whether it is constitutional on the question of separability. In other words, if separating the unconstitutional part gives to the means prescribed by the act a different object from the act itself, as provided in the act itself, in effect you are dividing the act and placing it in an entirely different sphere from what it was intended.

In the *Butts case* this Court had before it the question of whether the Civil Rights Act prohibiting the discrimination against a colored person for the broad purposes outlined in the Civil Rights Act, which must have read into it the aftermath of the Civil War, whether that

act was constitutional as applied to a coastwise vessel traveling from Boston to Norfolk; and this Court held that inasmuch as it had already held that the Civil Rights Act was unconstitutional as applied to the States, on the basis of the very plea we now appeal to you on, which is the object of the act, as revealed in the preamble, Your Honors held that the object of that Civil Rights Act was something, as I say, more important than the mere regulation of the convenience of a person traveling from Boston to Norfolk.

And so you refused to apply it to the purpose ascribed to it in that particular case, and of course supporting that is Your Honors' decision in *Railroad Retirement Board* v. *Alton R. R. Co.* (295 U. S. 330), where you said in general terms that an act could not be put to a different purpose than that disclosed by the act itself.

ORAL ARGUMENT ON BEHALF OF THE RESPONDENT

Mr. FAHY. If the Court please, the position of the Government with respect to the argument just made is that indicated to me from the questions of Mr. Justice McReynolds and Mr. Justice Sutherland, that it is not a question of separability, it is a question of application.

The act by its terms applies to no one in particular. It is an act the primary object of which, as shown by the preamble, is to prevent industrial strife burdening or obstructing commerce. The only jurisdictional provisions in the act are those where they were necessary to be placed to give authority to the Board to prevent the practices under certain circumstances; that is, affecting commerce.

Now that phase, as shown in the committee reports, is used as a short cut for the whole act, where there was a question of jurisdiction, and it was defined in the portion of the act relating to definitions so that the definition would not have to be repeated wherever there was a jurisdictional question in the act itself. It is defined as "in commerce, or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce", and "commerce" is defined in the traditional sense of interstate and foreign commerce, with the one addition that in the District of Columbia and in the Territories the plenary power of Congress is exercised, which accounts for and made necessary the broad definition of "employees" contained in the definitions of the act. Except for that broad definition of "employees", the plenary power of Congress in the District of Columbia and the Territories could not be exercised.

It is clear from the structure of the act that it must be applied under the facts of each particular case, and the facts of each case must be brought within the commerce power as expressed in the jurisdictional provisions of the act. Now it is true that the Board has taken jurisdiction and is presenting to the Court for its determination those cases which the petitioner in this case calls so-called intrastate cases; but the question is whether or not the act applies to those cases under the jurisdictional limitations of the act, and that is the sole question there.

The contention that the act has such a broad purpose, notwithstanding the jurisdictional limitations, that, even if applicable to certain types of industries, it must fall completely, would seem to be unsound both in reason and from the precedents. The precedents principally relied upon for that proposition are *United States* v. *Reese* (92 U. S. 214), the *Trade Mark Cases* (100 U. S. 82) and the first

Employers' Liability Cases (207 U. S. 463). The Court will recall that in each of those cases the language of the statute was general and indivisible, as the Court described it; so that in order to bring the statutes within the constitutional power of the Federal Government, the Court said it would have to read into the statute in each case words of limitation, which it was not called upon to do. Whereas in this statute Congress itself has read into the statute, has placed into the statute in the jurisdictional provisions themselves, the very words of limitation, within the Federal power, which were omitted in each one of the statutes considered in the *Reese case* and the *Trade Mark cases* and the first *Employers' Liability cases*.

Obviously, the purpose of the act being to protect interstate and foreign commerce by this means, it is—not only from these precedents but from principle—unreasonable to say that Congress did not intend to do the very thing that it was seeking to do; that is, to protect interstate and foreign commerce from the burdens and obstructions of industrial strife.

Now the contention is made by the petitioner that Congress, I suppose, thought that power extended where it did not extend. It may be that Congress so thought; but in order that the statute which it enacted should not go beyond that power, whatever it was, and however broad a scope Congress might have hoped that it would have, it placed in the statute the constitutional words of limitation based upon the commerce clause.

If this act were limited, as we contend it should not be limited, because we contend the commerce power itself is not so limited, to industries akin to that now before the Court, the act would be applicable to a larger number of employees than the present Railway Labor Act. There would be approximately 2,000,000 employees and their employers subject to the act, even if it were limited to interstate transportation and communication and the maritime industry. Now the Congress having enacted special legislation for the railroads along this line, is it to be assumed that in endeavoring to extend, to the full extent of the commerce power which may be exercised in this respect, the benefits of such legislation, it did not want to extend those benefits to such industries as the tremendous interstate motor-vehicle industry, the tremendous interstate communication industries, and the whole maritime industry, to mention only a few.

In view of the fact that the question as to the findings of the Board was disposed of in the manner in which it was, I will, of course, not go into any discussion of the facts of the case. I simply would like to make this statement on behalf of the Board—that if the Court were called upon to review the findings of fact made in this case, it would not only find that those findings were supported by the evidence, but that the conclusion reached by the Board was inevitable; that the Board arrived unquestionably at the truth, which was all that it was seeking to arrive at; and, notwithstanding the statement of the trial examiner cut out and read to the Court this morning, the Court would find, if it reviewed this record, that there was a tremendous amount of evidence permitted to be introduced by witness after witness, and there was not the slightest curtailment of the fullest opportunity to be heard in the development of the case.

(Whereupon, at 3:05 p. m., the oral argument in this cause was concluded.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

ORAL ARGUMENT

WASHINGTON, D. C.,
Wednesday, February 10, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 3:05 p. m.

Appearances:

On behalf of the petitioner: Hon. Stanley Reed, Solicitor General of the United States; Hon. J. Warren Madden, Chairman, National Labor Relations Board.

On behalf of the respondent: Mr. Earl F. Reed, Mr. Charles Rosen, Mr. W. D. Evans, and Mr. John E. Laughlin, Jr.

The CHIEF JUSTICE. No. 419, National Labor Relations Board against the Jones & Laughlin Steel Corporation.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. MADDEN. May it please the Court, in January 1936, a charge was filed with the regional office of the National Labor Relations Board at Pittsburgh by the Amalgamated Association of Iron, Steel, and Tin Workers, Beaver Valley Local Lodge. I shall hereafter call this lodge the union.

This charge alleged that the respondent herein, the Jones & Laughlin Steel Corporation, had violated section 8, subsections 1 and 3, of the National Labor Relations Act, in that it had interfered with, restrained, and coerced its employees in their right to self-organization, and in that it had discharged a number of its employees because of their union membership and activity.

The Board, after investigation, issued a complaint against the respondent alleging these same violations. The respondent filed a special appearance and answer, in which it denied the reasons alleged by the Board for the dismissals, although it admitted the dismissals,

and in which it raised a number of constitutional objections to the act and to the act's application to this respondent.

The Board held a hearing and the respondent participated in that hearing only during the stage when evidence was being introduced as to the nature of the respondent's business. When that evidence was completed the respondent made a motion to dismiss the complaint upon the ground that the evidence had shown that the Board has no jurisdiction and that the act had no application to the respondent. That motion being denied, respondent withdrew and took no further part in the hearing.

The hearing continued, and the Board made a decision and order to the effect that the respondent had violated these sections of the act by interfering with, restraining, and coercing its employees, as charged in the complaint, and that as to 10 employees it had discharged them because of their union membership and activity.

The Board further found that, due to the nature of the respondent's business and of the other facts in the case, these unfair labor practices were unfair labor practices affecting commerce within the meaning of the National Labor Relations Act.

The Board then filed its petition, pursuant to section 10 (e) of the statute, with the Circuit Court of Appeals for the Fifth Circuit, the circuit in which the respondent does business, asking that court to issue its order enforcing the order of the Board. That court denied the Board's petition upon the ground that the statute was not applicable to this respondent in this situation. The court later denied the Board's petition for a rehearing. The Board petitioned this Court for certiorari.

The questions presented in this case are whether the National Labor Relations Act is applicable or can be applicable to this respondent in this situation under the provisions of the commerce clause of the Constitution, whether the act is in violation of the fifth amendment as a deprivation of the respondent's liberty or property without due process of law, whether it is in violation of the seventh amendment as denying the respondent the right of trial by jury, and the first amendment as denying the respondent the right of free speech, and as to whether the respondent can bring into question other provisions of the act than those which have been applied to it, and if so, whether those other provisions are separable.

The respondent is the fourth largest company in the steel industry in the United States. Its assets consist of some $180,000,000. It is, according to its own statement, filed with the Securities and Exchange Commission, completely integrated, owning and operating iron-ore mines, transport boats, limestone and coal mines, a railroad, the mill at Aliquippa where the events in question in this case took place. These things will be further described in the statement.

The plant of the respondent here in question is located at Aliquippa, Pa. That is on the Ohio River about 12 miles below Pittsburgh. The plant is a large plant, covers about 475 acres, and extends up and down the Ohio River about 5 miles. It is one of the two plants of the respondent, the other one being of about the same size and being located at Pittsburgh.

The Aliquippa plant employs about 10,000 employees. It is located at a strategic commercial location near the junction of the Ohio and the Monongahela Rivers and with access to the Pittsburgh & Lake Erie Railroad, which is a part of the New York Central Railroad System. There is in the plant itself and wholly owned by the respondent a railroad consisting of some 43 miles of trackage, together with the locomotives and cars, and having about 450 employees.

The respondent obtains its iron ore from mines owned by itself in Michigan and Minnesota. Its other principal raw materials are limestone and coal for coking purposes. The iron ore is brought from the mines by industrial railroads which depend almost entirely upon this ore business to the upper lake ports of the Great Lakes. It is from those ports transported by special ore carriers, some of which are owned by the respondent itself and some of which are apparently common carriers, to Ashtabula, Ohio, where the respondent maintains docks. There the ore is unloaded, mostly directly into railroad cars, for transportation to Aliquippa. Sometimes, depending upon the needs of the situation, some ore is stored at the docks at Ashtabula.

The coal is obtained from the respondent's coal mines, which are located up the Monongahela in Washington County, Pa., which are there operated by a wholly owned subsidiary of the respondent. The coal is transported from those mines in the respondent's own equipment, barges and towboats, to the river adjacent to the Aliquippa plant.

Respondent's limestone is obtained from its quarries in West Virginia principally. It also has quarries in Pennsylvania. It is transported by rail to the respondent's plant at Aliquippa.

In October 1935, which was a representative month, 6,222 carloads of materials came into the respondent's Aliquippa plant. Something more than 200 carloads per day. Ninety-seven percent of the business done by the P. & L. E. Railroad at the Aliquippa station is attributable to this respondent. The respondent is the largest customer of that railroad anywhere on its line.

The incoming shipments are unloaded by the respondent's own employees and are handled continuously through this steel mill. Outgoing shipments take place from practically every stage of the process. In other words, semifinished materials and materials in other stages of finish down to the ultimate product are loaded out and shipped out at all stages. Each department of the mill has its own shipping department.

Blast furnaces are the first step in the process, and there, by the mixture of iron ore, coke, and limestone, the pig iron is made. The pig iron emerges and is never allowed to cool, but it is transferred immediately to the Bessemer converters or the open-hearth furnaces for the making of steel. Out of these furnaces the steel comes in molten state and is poured into ingot molds, but there again is never allowed to cool, but goes immediately into the soaking pit, where it is given a uniform temperature for the purposes of rolling, and from there it goes into the various rolling processes, the first process being either slabs or blooms, and some of those are shipped away, loaded on cars and shipped away to customers from that point. The rest of it is further processed, some of it completely processed into pipe or wire or nails.

Practically all of its business is done on customers' orders, the respondent manufacturing practically nothing for stock. Ordinarily customers' orders are filled within a week after they are received.

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Respondent itself states that 100 industries look to Jones & Laughlin for steel. Part of its products are shipped out by rail, some 60 cars a day of steel and other products going out of the mill. A very large amount of its products are shipped out by boat down the Ohio and Mississippi Rivers, and that by the respondent's own equipment.

Respondent maintains warehouses in the large cities along the Ohio and Mississippi Rivers, also in Chicago, Detroit, and Long Island City, N. Y. From these warehouses products are transshipped by rail to the customers. In two of these warehouses are fabricating shops for further processing of the materials.

Respondent's sales are throughout the United States and many foreign countries, and are arranged through 20 sales offices maintained by the respondent in the principal cities throughout the United States. These sales offices, as I understand it, arrange the orders, which then come into the plant, and the shipments are made from the plant or from the warehouses which I have mentioned. Sales are made at a delivered price.

Here we have then a Nation-wide enterprise drawing materials from a number of States, transporting these materials to a considerable extent in its own equipment, processing them, again transporting and marketing the products, marketing the products through its own organization, and to a considerable extent transporting through its own organization.

Justice SUTHERLAND. I may have misunderstood you, but I gathered from your statement that they are not engaged in transporting any but their own products?

Mr. MADDEN. That is right, yes, Your Honor. They are not engaged in transporting for others.

Justice SUTHERLAND. These materials are to be employed in manufacture?

Mr. MADDEN. To a considerable extent. There will be some further statement about that.

Now, consider for a moment the steel industry as a whole, of which this respondent is a very considerable unit. The whole industry shows on a larger scale substantially the same pattern. Nearly all of the ore, 85 percent of the ore, which is used in the steel mills of this country, is obtained from Michigan and Minnesota. Most of the steel is manufactured in Pennsylvania, Ohio, Indiana, and Illinois, some in Alabama. None of those States except Pennsylvania and Alabama have supplies of coking coal. So that there is this constant movement of ore from Michigan and Minnesota over the Great Lakes to the steel mills, and a constant movement from the other direction of the coal for coking purposes from the western Pennsylvania area to the mill, and again the movement of limestone of the same kind. And out of all of the mills the same sort of current of commerce occurs in the products of the mill.

The entire steel industry involves an investment of some five billion dollars, and in 1934 used some 50,000,000 tons of material. I may say that the respondent itself over a period of 10 years prior to 1930 averages 3½ million tons of iron ore per year.

The steel mills are located on the cheap water transportation of the Ohio River and of the Great Lakes. Whatever migration of the steel industry there has been in recent years has been along the path of this current of commerce, moving away from the Pittsburgh area and closer to the sources of supply of the ore, along the Great Lakes.

The president of the United States Steel Corporation said:

> The production line of the automobile industry now begins back in the steel mills, and we are in accord with any effort to keep it running more steadily through the years.

It seems to me that the pattern of commerce which we have here fits admirably the language which this Court used in the case of *Stafford v. Wallace* (258 U. S. 495), when it said:

> The application of the commerce clause of the Constitution in the *Swift case* was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever-flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control.

I observe that in this statement not only does this Court suggest that there is a right in the Congress of the United States to protect these great streams of commerce, but there is a duty, it having been one of the principal purposes for the creation of the Nation out of the group of separate States for it to do just these things.

The Beaver Valley Lodge of the Amalgamated, which we call the union, was chartered in 1934. Immediately the respondent countered by opposition. It set its company police upon the leaders of the union. It followed them about. It followed them even to neighboring towns when they went there to meet visiting organizers. An employee of the company stationed himself at the house of the principal mover in the union activity, taking down the names of all who visited the house and questioning some of them as they came away.

The union officers, and higher officers of the union, national officers of the union, were vilified. The employees were warned as to what would be the consequences of the growth of the union or of their union membership. One employee at least was warned that he would not longer be able to let his rent remain in arrears if he joined the union, and that his credit in the local stores would be destroyed.

Over a comparatively short period 10 employees of the respondent were dismissed for what the Board found to be union activities. In each, of course, the supervisor gave on the occasion of the dismissal some other reason for the dismissal. His reasons are shockingly trivial, one man of many years standing having been dismissed for failure to close a door, another for leaving his keys lying on the desk near the crane. The whole thing is in a rather familiar pattern. At the first slight infraction of rules the dismissal comes, for reasons which, I think, Your Honors would agree no enlightened employer would really dismiss his employees. The picture is very much the picture which the district court had in the *Texas & New Orleans case*, when the men involved there were dismissed, the company in each case giving reasons for the dismissal which the court simply did not believe were the true reasons for the dismissal.

The Board, as I said, ordered the respondent to—I should have said with reference to your question that these workers who were dismissed were engaged in various duties about the plant, some of them operating cranes which in general moved the materials forward from one department of the plant to the other, but which were also used to load materials out of the plant (if they were sold at that stage of the process), some inspecting motors, some driving tractors, one at least operating a nail machine. The Board, as I said, ordered the respon-

dent to cease and desist and reinstate these men, and that order is the subject of this litigation.

The statute and the Board's order were based upon the commerce clause of the Constitution, and so the question arises what had the respondent's conduct to do with commerce among the several States?

In the first place, Congress has found, and history and experience show beyond question, that the conduct which the respondent was found by the Board to be guilty of in this case does produce industrial strife. There certainly can be no serious argument about that question. If you do these things to your employees what is the expected reaction? We submit that in the absence of a law such as this the employees have one of two choices: They can either lie down and give up their ambition to protect themselves by unionization and collective bargaining; or, on the other hand, they can strike.

Now, this Court in *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184), which has been referred to many times in this case, has said that they have a right to have their union and that they have a right to organize for the purpose of protecting themselves, and if the employer does interfere with that right trouble may be expected.

These employees did not resort to either one of those alternatives. They did not lie down and they did not strike. They brought their case to an agency of the Government which they thought had jurisdiction to right their wrongs in an orderly fashion.

The problem for the Board then was not whether this kind of thing tended to produce industrial disturbance. The Congress had settled that, and had settled it in accordance with all history and all experience. The question for the Board was rather, Does this conduct of the respondent in this situation affect commerce within the meaning of the Constitution? If it does, it affects it within the meaning of this statute and the Board has a right to apply the statute to the situation. I need not go into the language of the statute again on this point. That has already been covered. But we argue it was the evident intent of the Congress; Congress had no apologies for this law; it thought that it was a good law; it thought that it would bring, or tend to bring industrial peace, and it wanted the application of the law to be as broad as it constitutionally can be made, and it used this language that has been referred to, that in situations affecting commerce the law shall be applicable.

Obviously, in the administration of the law the Board must look to the decisions and opinion of this Court with reference to the situations to which it could constitutionally apply the law, finding exact precedents where it could, drawing analogies which seemed to it to be fair. That, then, has been the Board's source of authority for the position which it took in this case.

Now, an examination of the precedents of this Court with reference to the power of the National Government in relation to industrial strife, the difficulty with reference to the precedents is this, that in the past, except for the experience in the railway industry, the National Government's dealing with industrial strife has been only on a penal or control basis; that is, on the basis of going in and attempting to do something about it after the strife had broken out. This statute, of course, is obviously a preventive statute. It is entirely possible that in this case it has prevented labor toubles by allowing the men to bring their case to the Board and to this Court.

Counsel for the respondent say in effect the National Government being a government of limited powers, it cannot act until it has a specific situation to act upon. Again and again in respondent's brief this is stated in effect: "You talk about solving industrial strife, but there is no industrial strife. There was no strike in our plant." We think that this idea would prevent the National Government completely from extending any sort of preventive remedy in the direction of industrial strife, and we think that this is a counsel of despair, which is neither reasonable, practicable, nor in accord with the precedents of this Court.

We have no doubt that to whatever extent the National Government could constitutionally deal with industrial strife after that strife had broken out, it has the power to prevent such strife if there is a reasonable likelihood of strife of the sort which it could deal with after such strife had broken out.

The history of the Packers and Stockyards Act is here as an example. After many years of effort by the National Government to deal with particular conspiracies after the conspiracies had been made, the Government went into the preventive business and established somewhat meticulous regulations for the operation of all these stockyards and wiped out the whole difficulty in one act.

We think the decisions of this Court approve the application of the Federal power to the following situations involving industrial strife:

(*a*) Where such strife involves an intent to affect commerce.
(*b*) Where such strife has the necessary effect of substantially burdening commerce.
(*c*) Where such strife is an example of constantly recurring industrial strife which is a burden upon interstate commerce.

In this case there is a very considerable probability of a strike with intent to affect commerce. The Solicitor General is going to deal with that situation, and I pass over it. But the National Government's power is not limited to cases of intentional strikes. If that be true, that would be a most remarkable limitation upon the power of the Congress to deal effectively with the Nation's commerce. It would mean this, that if two sets of persons under exactly identical physical situations did exactly the same acts with exactly the same effects upon interstate commerce, the power of the National Government would reach to one set of those persons but would not reach at all to the others. This Court has laid down no such doctrine. On the contrary, in the first *Coronado Coal case* (259 U. S. 344), this Court said:

> Coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred.

Again, in *Industrial Association* v. *United States* (268 U. S. 64), the Court repeated with approval the same language, and again in *United Leather Workers* v. *Herkert & Meisel Trunk Co.* (265 U. S. 457) is the same language.

The respondent recognizes that "necessary effect" may be just as valid a reason for the application of the commerce power as "intent." On page 91 of the respondent's brief appears this language:

> If this were a proceeding against striking employees under the antitrust laws, the connection between strikes and stoppages of commerce might be legitimately urged as a reason for inferring an intent to restrain the movement of commerce,

but here there is no actual or threatened strike such as the petitioner supposes to exist.

Suppose, when the circuit court of appeals decided that the Board had no jurisdiction and that this act had no application to this respondent, the workers involved in this case had said to themselves, "We thought we had three choices. We thought we could either lie down or strike or resort to the law. Now we have found that we have only two choices, and we choose to strike."

This extract from the respondent's brief which I have just read you indicates that this would be the respondent's counter to such a strike; it would go into the Federal District Court for the Western District of Pennsylvania and file a bill in equity saying something like this: "A group of men down at our plant have entered into an agreement in restraint of commerce. The consequence is an enormous disruption of the commerce of the Nation. Orders cannot be filled, goods cannot be shipped, mines in Minnesota and Michigan cannot operate, boats on the Lakes are stopped, railroads have nothing to transport and nowhere to unload it if they do transport it. Boats on the Lakes are stopped. Telegraph and telephone messages are coming in all the time from every State in the Union 'Where is the steel that I ordered? It should have been ready for shipment by this time.'" A disruption of commerce which is almost inconceivable.

The petitioner there, or complainant, says, "We are entitled to an injunction against these people. They have no right to enter into an agreement which thus disturbs the commerce of the Nation. Our authority is the language of the Supreme Court in the *Coronado case*. These men are well informed. They must have known when they struck that this would be the effect upon commerce, and therefore the necessary intent will be inferred." Suppose the Court says, "On the authority of the *Coronado case* you seem to be entitled to your injunction, but, by the way, what caused this strike?" "Well," these workers say, and the Labor Board found, that "the strike was caused by a rather small incident. We discharged 10 men because they joined a union." The judge says, "Was that a violation of the National Labor Relations Act?" Counsel says, "It would have been, except that the National Labor Relations Act had no application to the case. The case had nothing to do with interstate commerce."

And we have a situation which it seems to me is quite illogical, that the very thing which caused the strike, which caused it immediately, and as a result of which it immediately came about, that thing is held by the circuit court of appeals as having no sufficient relation to commerce so that the Federal Government can do anything about it.

Now, the consequence of such a ruling is this, that in no circumstances can the National Government do anything about employer-labor practices in these industries which ship goods in interstate commerce and as to which striking workers may be prosecuted or enjoined by the National Government under the operation of the Sherman Act.

This doctrine, then, of "necessary effect" as being the equivalent of "intent" is the doctrine of this Court. It is plain then that this Court has not placed any spurious and crippling limitations upon the constitutional grant of power to Congress to regulate commerce.

I desire to return for the moment to a discussion of *Stafford* v. *Wallace* (258 U. S. 495), which is an analogy the Board has resorted to in the decision of its cases.

Can there be any doubt that industrial strife in a stockyard which would stop the stream of commerce through that stockyard would be a proper subject for the cognizance of the National Government?

Justice VAN DEVANTER. Would you say that again, please?

Mr. MADDEN. Can there be any doubt that labor trouble in a stockyard, which labor trouble stopped the flow of commerce through that stockyard, would constitutionally be a proper subject of control by the National Government?

Justice MCREYNOLDS. If the men in that stockyard were employed at something which may not interfere with interstate commerce, how far would you go?

Mr. MADDEN. There is always, of course, in considering these problems, just as there has been when this Court considered the labor cases under the Sherman Act, not merely the constitutional question of the limitation but the question of the wisdom and practicability of it.

Justice MCREYNOLDS. I am asking you about the power. Does Congress have the power to say to these men——

Mr. MADDEN. I should say that if they said to a man there, "You cannot quit your job," you would be in difficulties there with the thirteenth amendment to the Constitution. I should say that if you said to a group of men there, "You cannot enter into an agreement to quit your jobs, although individually you may quit them," there you would face no problem of constitutional power at all, but merely a problem of the wisdom of its exercise.

Now I should say that it would be unwise to so exercise the power unless you had first done all that you could by way of prevention of the difficulty.

Justice MCREYNOLDS. We are not going to decide the wisdom of Congress. Did Congress in the *Stockyards case* interfere with the interstate commerce clause because they did not pay sufficient wages and say that they must pay each one of them $10 a day?

Mr. MADDEN. No; I should suppose not. I could imagine that there might be a sufficient connection between the wages and the labor troubles, thereby stopping the flow of commerce, but I see no such intimate connection whatever as there is between strikes and the flow of Commerce.

The statistics which we rely upon here show that a very large number of strikes are not based at all upon problems of wages and hours and substantive conditions, but are based upon the desires of the men first to organize themselves into unions, so that they can speak to their employer with some authority with reference to their conditions.

May I ask you about the time?

The CHIEF JUSTICE. You have used 40 minutes.

Mr. MADDEN. It does seem to me that if the National Government really has the power to protect the flow of commerce through the stockyards, for example, by the meticulous regulation which it has imposed in the Packers and Stockyards Act, if the overcharge for the use of the stockyards of the amount of a few cents or a few dollars is really of interest to the National Government, then I cannot conceive of how some other activity which would stop the flow of commerce completely, instead of levying a little additional financial charge upon it, but which would stop it completely—I cannot con-

ceive why that would not be of equal interest to the National Government.

If you will indulge me, I want to read from Your Honor's own language in the——

Justice SUTHERLAND. Is that the basis of your argument, that it completely stops the flow of commerce?

Mr. MADDEN. That is the basis of my particular argument.

Justice SUTHERLAND. In relation to this case?

Mr. MADDEN. Yes. No; that is not all that there is to be said for this case. That is one of the arguments.

Justice SUTHERLAND. In other words, that is the basis of the argument you are making now?

Mr. MADDEN. Yes. If Your Honor will indulge me, I want to speak about that in connection with some language which this Court itself used in *Stafford* v. *Wallace*.

The object to be secured by the act—

That was the Packers and Stockyards Act, of course—

is the free and unburdened flow of livestock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East * * *.

Now, if Your Honor please, it seems to me that the flow of commerce which is described in that language and which was the fact in those stockyards cases was a flow of commerce not only through the stockyards but through the meat factories, through the packing plants. The consequence is that the analogy which we draw of the flow of raw materials into and through and the flow of finished products out of the steel mills seems to be a logical one.

Justice SUTHERLAND. So far as the cattle are concerned, how far could you go? You say that that is an analogous situation?

Mr. MADDEN. That is right.

Justice SUTHERLAND. Taking it back, for instance, to the herder; suppose the herders raising cattle organized a union. Could Congress regulate that?

Mr. MADDEN. I should say not, Your Honor. I should say that you have with reference to the commerce of the United States a problem somewhat similar—and certainly you have with reference to the extreme concept which this Court has used—you have a problem somewhat similar to that which you have with reference to physical streams of water. The water after it becomes a stream gets a wholly different sort of protection from what it gets when it is surface water or when it is percolating through the ground. At that time it is practically any man's property and it has very little protection from destruction. When it becomes a stream, however, it then comes under the scope of a different set of legal powers.

Now this process of drawing lines between intrastate and interstate activities, it may well be—it is not for us, of course, to cut the pattern for Your Honors—but it may well be that an analogy something like that may be useful in determining the extent to which the National Government can go in the control of the things which affect the commerce of the Nation—how greatly affect, how immediately, how directly, if you will, and so forth.

Now it does seem to me that by your own authority the meat factory is in the stream of commerce. The stream of commerce flows through it. I can imagine no reason why the Government, which has not only the right but the duty to protect that great flow of commerce, cannot protect there as well as it can just before it reaches that point or just after it reaches that point. Indeed, it seems to me that the attempt of the National Government to protect its great streams of commerce is futile if there is somewhere along the stream a point where the hand of the Government is stayed and where stupid State regulation, or lack of regulation, may destroy the whole stream which the Government has so carefully conserved up to that point, and which it is going to pick up again and conserve so carefully beyond that point.

I just cannot see why the Government, which undertakes to protect this thing, should allow it to get out of control at some stage in the course of the stream and then perhaps permit it to be destroyed, which would be exactly what would happen, of course, to our enormous stream of raw materials coming into this steel mill and our finished products going out.

If labor trouble should stop this mill, there is no question but what transportation would stop, communication would stop, boats would be tied at their docks, interstate orders and shipments could not be made.

Now, why should the Government interest itself so meticulously in all of these things just before they enter the gates of this factory and then allow the whole work of conservation to be lost while they are inside it?

We no more assert that manufacturing is interstate commerce than did this Court in *Stafford* v. *Wallace* assert that meat packing or soap making or feeding hay to cows is interstate commerce. We merely assert that the Government, which has the responsibility, cannot have the factory gates slammed in its face and have it said to it, "Inside here you have lost your control, and whatever happens to your great stream of commerce is none of the National Government's business."

A grave problem for this Court, of course, is the preservation of our very useful American system of dual sovereignty, but it does seem that where the United States has found its responsibility, certainly one of its grave responsibilities is to foster and protect the Nation's commerce, that where it has found that responsibility the States must give way to whatever means it develops as necessary for the National Government to adequately protect those streams of commerce.

I would like to say just a word about some of the points made in respondent's brief. They cite a large number of State taxation cases. It seems to us quite evident that those cases have no bearing whatever upon the matter. Your own opinion in *Stafford* v. *Wallace*, compared with *Minnesota* v. *Blasius* (290 U. S. 1) indicates what I mean. In *Stafford* v. *Wallace* you held that the National Government should regulate the stockyards. In *Minnesota* v. *Blasius* you held that the State could tax animals in the stockyard. It was perfectly evident that those animals, although they were in the flow of commerce, because by custom and history they would go on to other States, nevertheless, they were not in transit within the meaning of the other line of cases which would relieve them from State taxation.

It seems to me that *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry.* (249 U. S. 134), which the respondent relies upon, is simply another illustration of something which may or may not have been in the flow of commerce but which certainly was not in transit, and therefore beyond the State's power to tax and the State's power to regulate in a nondiscriminatory fashion.

FURTHER ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. Stanley Reed. May it please the Court, in *Virginian Ry. Co.* v. *System Federation No. 40*, Your Honors had before you the Railway Labor Act from the standpoint of the extent of congressional power over interstate commerce, the separability of the act, and its interpretation, and whether or not the provisions of that decree were made invalid by the fifth amendment.

In *The Associated Press* v. *National Labor Relations Board* almost the same questions arose, except that no questions of the interpretation of the statute were raised. In the series of cases that we are now discussing we have a situation which requires that we give thought to the power of the Federal Government to regulate interstate commerce and to protect its flow, even though to do so it must reach into the industrial and manufacturing enterprises of the Nation.

In the brief for respondent in this case an effort is made to discuss not only the precise issues which we conceive to be presented to Your Honors at this time, but also the entire theory of collective bargaining, its effects upon industry, and the right of the Government to interfere in the rather intricate employer-employee relationship.

It seems to me that the same point of view was presented in *The Associated Press case*—that you were asked to consider not the particular instances that are before the Court in these cases, and not the particular sections of the act which we shall attempt to bring before this Court, but the broad field of labor relations.

Now, quite obviously, there are going to be many problems arising in the field of labor relations that will at some time be considered by this Court, but it does not seem to us that this act, phrased as it is, permits the entire theory of collective bargaining to be raised in these cases.

There are other provisions of the act that are criticized. The section as to exclusive representation—that is not before the Court at this time. It is our position that this act, which is a regulation and protection and control and encouragement of interstate commerce, is an undertaking to protect that commerce through dealing with those labor relations that directly affect that commerce.

Whether that is separable from collective bargaining I do not intend to argue at length. I do, however, wish to make this comment—that collective bargaining is not the ultimate end of this act. It is phrased, of course, as a regulation of commerce. It is, from our point of view, a regulation of commerce. It deals with labor relations as they directly affect commerce. And in labor relations as they are known today to all men nothing is of more importance than the right of freedom of organization and the right to be free from dictation or coercion in that organization and the right to select representatives to deal with employers, whether through coercive collective bargaining processes or otherwise. We make this distinct point, therefore,

that regardless of collective bargaining provisions and regardless of provisions as to exclusive representation, this act sufficiently manifests the intention of Congress—and the intent is the test of separability—that even though collective bargaining might be found to be contrary to the due process clause, certainly there is, nevertheless, sufficient virtue and sufficient good to be found in the provisions dealing with representatives and with freedom from coercion or interference in the choice of those representations or in the organization of unions to justify their separate enactment.

The legal principles, counsel for the respondent and ourselves would probably state in almost the same language. We do not contend, of course, that this act is based upon any power except that derived from the commerce clause. They certainly would not say that due process requires that everyone should be left absolutely free from the power of government to protect the general good. It is in the application of those different theories that we find ourselves in disagreement.

The brief of respondents treats lightly the importance of firing 10 or 11 men out of 20,000 and asks how that could interfere with or affect interstate commerce. I thought I heard the same thought expressed in *The Associated Press case*. It was quite reminiscent of the things that were said in the early days when the Government undertook the regulation and control of the railroad systems. A doughty old commodore of transportation expressed his opinion of the interests of the public in language that no one has forgotten. We had expressions of the intolerent attitudes of railroad operators with respect to the snooping activities of the Interstate Commerce Commission, when they came to investigate the railroads' books in regard to political donations.

And now we have that same attitude expressed through the opposition of these respondents to the action in this case—the right of an employer to protect his own business, to hire and fire as he thinks wise, free of the meddlesome interference of Government on behalf of his employees. We take it that it is clear that there are certain rights that employers must allow the public and their employees, even though it does affect their own constitutional freedom and property and due process to a reasonable degree; provided, of course, that we exercise that interference for an aim that is legitimate and within the constitutional powers of the Government.

The statistics on strikes over a period of years show clearly the great problem which strikes create. On the last page of the Associated Press brief and on the last page of the brief in this case Your Honors will find two different tables. They point out that strikes brought about because of a desire to organize or because of interference with organization make a growing percentage of all the strikes in the country. They point further to the fact that in some years almost a million and a half men are affected by these strikes, and, broadly speaking, an average of about 15 days each year is lost through strikes for each man affected.

Of course, the Court is thoroughly familiar with the seriousness of the strike situation. We might expect that because we have a serious situation we would find that the Government has power to provide a remedy. We need to go farther than that. Consequently there has been a long-continued interest of the Federal Government in the strike situation, and in the industrial situation as a whole, that

reaches back to the Industrial Commission of 1898 and comes on down to the National Industrial Recovery Act. A typical result of those continuous investigations will be found on page 65 of our brief, where we refer to the report of the President's Industrial Conference of 1918. All of these matters were before Congress. Not only were the Members of Congress as familiar as we are with the constant research and investigation into the strike situation, but they held prolonged hearings in which they discussed the problem of the strike, its effect upon the industry and the commerce of the country, and the steps which might be taken to remedy the situation.

Now, we are to consider whether or not this act was within the power of Congress, whether its provisions apply to the respondents in this case, whether we can separate the collective-bargaining provisions, if necessary, and whether or not the provisions of this decree or order deprive the respondent of due process. Many of those things have been commented upon before, and I do not intend to go into them in detail again.

Justice McReynolds. What does the order require, Mr. Solicitor?

Mr. Reed. It requires, sir, if I may answer your question without quoting the order, that the employees who have been discharged should be restored to their places.

Justice McReynolds. The man who works on a crane should be put back on the crane where he was working?

Mr. Reed. It does not say, of course, on the crane, but it is equivalent to saying his same position.

Justice McReynolds. So that he may be put back to work which he had before?

Mr. Reed. Correct, sir.

Justice McReynolds. That is the effect of the order?

Mr. Reed. The effect is to make the man whole. He is to be paid for the time he lost insofar as he lost any money. It is to make the man whole because of the unfair labor practice which was found by the Board.

Justice McReynolds. I am trying to get at the effect of the order, if you will be good enough to tell me.

Mr. Reed. The effect of the order is to restore him to the position that he was in before.

Justice McReynolds. What does that mean?

Mr. Reed. That means that he goes back there on the crane, if you please, in that sense, and is therefore at that instant in the same position he was before.

The Chief Justice. Employed at will?

Mr. Reed. Employed at will.

The Chief Justice. And can be discharged the next day?

Mr. Reed. Provided he is not discharged because of his union or labor activities.

The Chief Justice. Exactly; but employed at will?

Mr. Reed. Employed at will. I think that answers the whole question. The employer is also required, of course, to cease and desist from interfering with the organization of labor and to post notices to that effect.

We find the constitutional bases for the act in the sections that have been called to your attention. The most important ones are in section 1. I hardly think it necessary to do any more than to call attention to the fact that it is based particularly on the statement that the refusal by employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce.

The last paragraph of that same section states—

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of interstate commerce.

As has been repeatedly said here, this act is based on the commerce clause and on this declaration of policy in the act. Moreover, the act is limited in its application by section 10 (a) to conditions of industry or labor which directly affect commerce.

Congress could have approached the problem in either of two ways: It could have dealt with each strike situation after it arose, or it could have had a preventive bill which sought to stop strikes before they started. The Sherman Act (26 Stat. 209, 15 U. S. C., sec. 1), of course, is one of the best examples of the prohibitory or punitive power of Congress. The Federal Trade Commission Act (38 Stat. 717, 15 U. S. C., ch. 2), the Grain Futures Act (42 Stat. 998, 7 U. S. C., ch. 1), and the Packers and Stock Yards Act (42 Stat. 159, 7 U. S. C., ch. 9), are examples of the preventive power of Congress.

It has never been thought by Congress, by the Executive, or by the Board, that this act applied to all strikes or to all the causes of any strike. It applies only to labor situations that develop and affect commerce. The closest analogy to this act has already been referred to from the bench. That is, of course, the Federal Trade Commission Act, in which practically the same language, of "in commerce" or "competition in commerce", was used to outline the jurisdiction of the Commission.

Section 10 (a) of the present act deals with its application, and its application is precisely the same as the application of the Federal Trade Commission Act. In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, (257 U. S. 441) and *Federal Trade Commission* v. *Raladam Co.* (283 U. S. 643) this Court considered the jurisdiction of the Federal Trade Commission under the terms of that act and reached the conclusion, of course, that the act could properly extend to dealings with matters which affected commerce or which were in commerce.

This act has the same procedural provisions as the Federal Trade Commission Act. A charge is made by employees who are affected. That charge becomes a complaint on the part of the Board. There is a hearing, there is a finding, and that finding cannot be enforced until a court determines that the action of the Board was within the terms of the act and that the acts of the employer were such as affected commerce insofar as their employees were concerned.

Now, the crucial question in this case comes just at this point: Is the application of this act—which we submit is thoroughly within the power of Congress—to this small group of employees in the Jones & Laughlin Co. a condition of labor or of employment that does affect commerce? The Board found from the evidence that it did. Its order was entered on that basis, because, after an examination of this particular situation, it concluded that this labor situation directly affected commerce.

There were reasons for that conclusion, to which we must give consideration. They have been stated already. We think that these

activities directly affected commerce, because commerce may be regulated and protected from strikes that have an intent to interfere with that commerce.

In our arguments in the lower court the court has frequently asked us at that point, "Well, is there evidence in this particular case that this was a strike with intent to interfere with interstate commerce?" And the answer, of course, is that there is no such evidence in this record.

The theory upon which Congress has control and may regulate strikes with intent to affect interstate commerce is quite clear and quite well known. First *Coronado Case* (259 U. S. 44), *Second Coronado Case* (268 U. S. 295), *Loewe* v. *Lawlor* (208 U. S. 274), *Duplex Printing Co.* v. *Deering* (254 U. S. 433), *Bedford Cut Stone Co.* v. *Stone Cutters' Ass'n.* (274 U. S. 37).

We contend that Congress has an equal right to protect against strikes with the intent to interfere with interstate commerce even when the strike has not taken place, or when the intent has not actually developed; that is, that Congress has a right to protect interstate commerce not only from the attack that has already gathered force, but also to go back into the causes that create strikes with intent.

It was that thought that was in the Court's mind in *Stafford* v. *Wallace* (258 U. S. 495), when you said (p. 520):

> The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the antitrust law, as in the *Swift Case*, certainly it may provide regulations to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment. * * *

We think that the same thing is implicit in the Grain Futures Act and in *Board of Trade* v. *Olsen* (262 U. S. 1), where you relied, in concluding that the statute was a valid control of commerce, upon the fact that dealing in futures was a means by which people had undertaken to create monopolies and conspiracies in restraint of interstate commerce, and that therefore Congress had power to reach into the conditions that caused those monopolies and conspiracies and thus to protect interstate commerce from injuries before they occurred.

Now we say that the Board, when a case such as this is presented to it, has a right to go into the question as to whether or not there is a strike with intent, or evidence of a conspiracy to interfere with interstate commerce, or evidence of conditions that would reasonably be thought to lead to a strike with intent. We say that such an intent is very likely to be found in a wholly integrated organization such as we have in this case—one that begins in Minnesota and Michigan and runs through the whole stream of commerce that has been detailed to the Court. Many of the employees are actually engaged in transportation itself. The boats of this organization run down the Ohio and the Mississippi. It operates its own intraplant railroads and loads its cars by its own employees.

Situations such as that which developed in *In re Debs* (158 U. S. 564), can easily develop in these cases. Of course, the attitude of the steel industry toward employee organization and representation is well known to the Court; it is shown here in exhibit 44.

We do not rest our argument upon the question of intent, nor upon the ability of Congress either to protect the flow of interstate commerce from strikes with intent or to eliminate the causes that lead up to strikes with intent to interfere with interstate commerce. But, we say that from the decisions of this Court, Congress might reasonably, and did, reach the conclusion that where there were conditions the necessary effect of which was to bring about an interference with interstate commerce, then it had the right to protect that commerce from those conditions. This Court said as much in the first *Coronado case*, when you spoke of the "direct, material, and substantial effect" that was necessary before the Sherman Act took effect and you said that that act took effect if the obstruction was "intended to restrain commerce" or had "necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred."

That language is repeated in *Industrial Association* v. *United States* (268 U. S. 64, 81), and you also spoke there of the—

> absence of proof of an intention to restrain it or proof of such a direct and substantial effect upon it, that such intention reasonably must be inferred.

Now, may it please the Court, that is not a repetition of the argument of intent. We are speaking now of the necessary result of certain labor and strike situations. That necessary result, while it is couched in language that would indicate that it was based upon intent, must necessarily depend solely upon the effect, because to say that acts which have the necessary effect shall be construed to have an intent to interfere with interstate commerce is exactly the same thing as to say that the necessary effect of such acts is to affect interstate commerce.

In the *Industrial Association case* the Court went even further and said that—

> * * * it is not enough that the object of a combination or conspiracy be outside the purview of the act, if the means adopted to effectuate it directly and unduly obstruct the free flow of interstate commerce.

In *United States* v. *Patten* (226 U. S. 525), it was held to be unnecessary to allege an intent in the indictment. If an intent is necessary, it is obvious that the power of Congress is circumscribed by the state of mind of the people involved in the conspiracy or strike or labor difficulty which we contend directly affects interstate commerce.

Now, on the question whether or not the necessary effect of a strike or labor difficulty is to affect commerce, we think that the Board is entitled to take into consideration the mechanics of the particular industry against which the complaint has been made. I spoke a moment ago of the direct, material, and substantial effect on commerce in the *Coronado* and in the *Industrial Association cases*. There is aols *United States* v. *Reading Co.* (226 U. S. 324) in which you commented upon the fact that those who were in competition with the Reading Co. were practically all brought into the one agreement, as evidencing the necessary result of such an agreement upon interstate commerce.

Your Honors have been very generous in giving time to the Government. We are approaching the end of these cases, and the two succeeding cases are quite similar to the case at bar. I believe that it will make for better organization of the argument if I may be permitted to borrow some of the Government's time from the succeeding

case. Counsel in both the *Fruehauf case* and the *Friedman-Harry Marks case* are here and have heard the arguments of these cases. If that would be agreeable to the Court, it would, I believe, simplify and expedite the hearing.

The CHIEF JUSTICE. Very well. How much time do you desire?

Mr. STANLEY REED. We have an hour in each of the other two cases.

The CHIEF JUSTICE. You have 35 minutes left of your time in this case.

Mr. STANLEY REED. I hope I won't take too long a time. I will condense the argument to the best of my ability, but I prefer not to be limited to the exact time.

The CHIEF JUSTICE. Whatever you take beyond the time allotted in this case will be debited to you in the others.

Mr. STANLEY REED. That is my understanding.

I also have a new Government publication of the National Labor Relations Board which undertakes to summarize certain arguments. I have discussed the matter with counsel on the other side, and if the Court will permit, we would like to furnish this to the Court as part of the record.

Before adjournment yesterday I had tried to state our position as to the separability of the respective clauses of this act, and to make it clear that the industrial cases must be considered from the standpoint not so much of what the act covered, as of the right of the Board to determine whether or not particular situations were within or affected commerce. I pointed out that Congress had the right to control strikes, and to control situations that led to strikes with intent to interfere with commerce, and that the same power which Congress had within the ambit of the commerce clause was granted to the Board in their consideration of situations which were presented to them.

I had spoken also of the strikes with the necessary effect of burdening and obstructing interstate commerce, and had undertaken to discuss the factors which entered into the determination of whether such strikes were within the control power, and if within the control power, were within the preventive power of Congress. I had commented upon one factor, the magnitude of the operation. I had called the Court's attention to their own statements in the first *Coronado case* and in *United States* v. *Reading Company* (226 U. S. 324).

I pass now to another factor, the size of the enterprise in its relation to the entire industry. We conceive that to be of importance in considering whether or not these strikes with intent or necessary effect do affect commerce, because where an enterprise is a large part of an industry it is quite obvious that industrial disturbances in that particular enterprise have a large effect whether or not they have a direct effect. Here we have an enterprise which is a large factor in the business of making steel. The facts have been presented to the Court, and I do not intend to go over them again.

We have also discussed here the problem of the stream of commerce, and we have suggested that as a factor in determining whether industrial disturbances in a particular enterprise which we conceive to be within the stream of commerce will have a necessary effect upon commerce. The enterprise now before the Court is one of the most striking examples of an industrial stream of commerce. The details are

before you: The commingling of the limestone and iron ore and the coal, the constant flow through the particular plants, the many people in the enterprise who are engaged in transportation activities; the close relation between the transportation facilities and the flow of the material; and the movement of the steel down the Ohio and the Mississippi to be distributed to the various consumers throughout the country.

Whether or not that is a stream of commerce in the sense that the phrase is used in *Stafford* v. *Wallace* (258 U. S. 495), and *Board of Trade* v. *Olsen* (262 U. S. 1), I think is immaterial on this particular point. What we are saying is that this stream of commerce—whether or not it is a stream of commerce that is in and of itself subject to the regulatory power of Congress which is so gigantic in size, and which reaches not only a particular locality, but also runs across State lines from the iron ore production, from the limetsone production, from the coal production, to distribution throughout the country, must be an important factor when we come to determine whether or not industrial disturbances in this particular enterprise are likely to or will probably interfere with commerce. Of course, disturbances in such an enterprise do disturb commerce.

There is another factor that we wish to comment upon, and that is the recurrent nature of the strikes which have an effect upon interstate commerce, whether direct or not. As phrased in *Carter* v. *Carter Coal Co.* (298 U. S. 238), there is no doubt of the magnitude of the effect upon interstate commerce. The problem is whether the effect upon commerce is direct. Just as Congress has the power to control strikes with intent and strikes the necessary effect of which is to interfere with commerce, so we contend that the recurring nature of industrial disturbances gives further power to Congress to act upon such situations.

The particular industry here is a striking example of recurring labor difficulties. The great steel strike of 1919 and 1920 is still fresh in our minds with the stoppage of transportation; the stoppage of production of steel and iron; and the inability of the factories and industries which depended upon the steel industry for their raw material to draw from their usual source of supply.

It is our contention that Congress, because of the fact that there are, in particular industries, constantly recurring strikes and difficulties, has power to act to protect commerce from those recurring difficulties. We point to instances where this Court has recognized such situations as being within the power of Congress.

In *Hopkins* v. *United States* (171 U. S. 578), and *Anderson* v. *United States* (171 U. S. 604), this Court declined to admit the application of the power of Congress through the Sherman Act to control the situations in the stockyards in those two cases. They involved exchanges which had certain agreements among themselves as to commissions, as to handling the business, and as to who was to partake of the business in the stockyards. Control of that was felt to be beyond the power of Congress. Yet later, in *Stafford* v. *Wallace* (258 U. S. 495), the Court commented upon the fact that Congress had taken into consideration the recurring nature of the difficulties that occur in the stockyards and the likelihood that those difficulties would lead to conspiracies in restraint of trade or monopoly, indicating that they

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at least gave form and added to the reasonableness of the undertaking by Congress of the regulation of those causes which had led to conspiracies and monopolies in those cases.

There were similar recurrent natures in the Grain Futures Act (42 Stat. 998, 7 U. S. C., ch. 1). Again this Court stated that disturbances which directly burden and obstruct commerce from time to time are within the power of Congress to act upon. In *United Leather Workers* v. *Herkert Trunk Co.* (265 U. S. 457) you summed up the effect of those two acts—the Grain Futures Act and the Packers and Stockyards Act—upon the basis of the recurrent character of the difficulties which obstructed commerce.

Of course, we do not contend that the mere continuous recurrence of difficulties is sufficient to give Congress power to regulate a particular industry, nor do we say that mere recurrence, in and of itself, is sufficient to give Congress power to pass acts which undertake to eliminate the causes of those difficulties. It is only when those recurring practices are of a type that would come within the control of Congress, by repetition, by the danger of bringing about intent, by the danger of creating situations which will necessarily affect commerce, that the constantly recurring difficulties fall within the power of Congress.

You commented upon that in *Stafford* v. *Wallace* when you said:

> The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent. * * *

That principle would apply in cases like the *Coronado cases*, or *Loewe* v. *Lawlor*, or *Duplex Printing Co.* v. *Deering*.

It is our contention that there is no difference between recurrent local practices affecting transportation and recurrent local practices which affect commerce among the States. By that I mean that insofar as recurrence is an argument for the exercise of the preventive power of Congress to protect interstate commerce, the fact that the recurrence of labor difficulties occurs in transportation does not place them any more under the control of Congress than if they had occurred in industry. I think that idea was in the mind of the writer of the minority opinion in the *Carter case*, where it was said, speaking of *Texas & New Orleans R. Co.* v. *Brotherhood* (281 U. S. 548), that "Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it."

We have become so used to the employment of the word "direct" in its relation to the power of Congress over interstate commerce that I think it might be useful to call the Court's attention to the fact that in the first *Coronado case* you considered that the acts which were held to be within the power of Congress, because carried out with an intent to affect interstate commerce, were actually indirect obstructions to commerce. Moreover, I desire to point out that we can see a difference between an indirect obstruction to commerce and a direct effect which acts materially upon commerce.

You said in the *Coronado case:*

> We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in *Swift & Co.* v. *United States* (196 U. S. 375); *United States* v. *Patten* (226 U. S. 525); *United States* v. *Ferger* (250 U. S. 199); *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.* (257 U. S. 563); and *Stafford* v. *Wallace* (258 U. S. 495).

And then you added:

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.

In the present case we say that the record makes it very clear that we have a situation where there is a reasonable probability that strikes will develop with the intent to interfere with commerce; that if they do develop they will have the necessary effect of burdening and obstructing commerce. These facts, together with the recurring difficulties in the steel industry, the large size of respondent's operations, and its important place in the steel world, justify the finding on the part of the Board that the labor disturbances in this enterprise would affect commerce.

That brings me to what I conceive to be one of the two important and critical questions in this case; that is, whether or not labor disturbances in industries, such as we are discussing here, so directly affect commerce that Congress has power to provide for their amelioration, if not their elimination.

We are faced with the decision of this Court in *Carter* v. *Carter Coal Co.* (298 U. S. 238), in which you said that wages and hours and labor conditions in that industry were beyond the power of Congress because they had only an indirect effect upon interstate commerce, and that however great the magnitude of the effect might be, it was not sufficient to give congressional power unless the effect was direct.

We conceive that the *Carter case* turned upon the question of the purpose of that Bituminous Coal Act. The Court said that "the primary contemplation of the act is stabilization of the industry through the regulation of labor and the regulation of prices." If that was the purpose of the Bituminous Coal Act, as stated by Your Honors, its aim was at a situation different from that which is sought to be cured by this act. We do not seek to argue contrary to the *Carter case*. For the purpose of this argument we feel that the *Carter case* may be taken, as stated by the Court, to be directed at the control of labor conditions and prices. We submit that when you considered the *Carter case* you considered it from the standpoint of the power of Congress to reach in and control a wage or a labor condition as a part of the scheme of stabilizing the industry which was undertaken by Congress.

Here we have an act with a different purpose, aimed at a different evil. It is merely repetitious for me to say again that this act sought to control strikes which had the intent or the necessary effect of interfering with commerce, not the labor relations in and of themselves. The act is not, in other words, directed at a regulation of wages or hours, but at the elimination of the causes of those types of industrial disturbances which this Court has repeatedly said were within the power of Congress. Therefore, to us, the *Carter case* is not a bar to the consideration by this Court of the merits of this particular act. This act is aimed, within constitutional limits, at things that Congress has power to protect—the flow of interstate commerce and the carrying on of these great enterprises. So there is

a distinction between the *Carter case*, which was directed at the control of wages and hours, and this case, which is directed at the removal of obstructions, or the removal of causes of obstructions, to the movement of interstate commerce.

It is not necessary that the *Carter case* should be overruled if this act is upheld. Nor is it necessary to think that if we can go this far in protecting commerce from obstructions because of the power to regulate strikes with intent or with the necessary effect of obstructing commerce, that we need open the door to go further into control of wages or hours or conditions of labor. It may well be that wages or hours or conditions of labor, as such, are beyond the power of Congress, because to interfere with them would be a violation of the due-process clause; or we may say that wages and hours are so distinct and separate from interstate commerce that they do not have a direct effect upon it under any circumstances, while here the rights of labor which are protected fit directly into labor conditions which result directly in interferences and obstructions to interstate commerce.

I now pass from the problem of directly affecting commerce to that of the due-process clause, insofar as this particular decree is concerned.

Justice SUTHERLAND. Before you pass to that point, what is the primary effect of a strike in a steel mill? Is it not to simply curtail production?

Mr. STANLEY REED. Certainly; that is one of the effects.

Justice SUTHERLAND. Isn't that the primary effect, the immediate effect?

Mr. STANLEY REED. Well, I should say it was the first effect. I do not mean to split hairs. Of course, that is one of the primary effects of it.

Justice SUTHERLAND. That is the primary effect, to curtail production, and then the curtailment of production in its turn has an effect upon interstate commerce; isn't that true?

Mr. STANLEY REED. As I understand it, no. The strike is not something that is a momentary change of, but instantaneously and at the same time that it stops production stops interstate commerce. It is a single thing that happens, and that stoppage of work stops interstate commerce right at that instant.

Justice SUTHERLAND. It affects interstate commerce just as the cessation of work in a coal mine. The primary effect of that, as suggested in the *Carter case*, was to curtail the production, and then the secondary effect which came from the curtailment of production was the effect upon interstate commerce.

Mr. STANLEY REED. Well, if we were undertaking to defend this act on the ground that Congress had the power to regulate labor conditions as such, I would fully agree with what Your Honor has said, but our contention is that Congress is not undertaking to regulate labor conditions as such; that it is undertaking to protect interstate commerce from situations that develop from those labor conditions, and that the causes which lead to these strikes with intent, and to strikes with the necessary effect, to interfere with interstate commerce are within the regulatory power of Congress.

Justice SUTHERLAND. If by some means you curtail the production of wheat, the immediate effect, of course, is to curtail the production of wheat, and that in its turn has an effect upon interstate commerce. So would you say that Congress could step into that field and regulate the production of wheat under the commerce clause or under some other power?

Mr. STANLEY REED. I am sure that what I would say would not bar Congress on it, but it seems to me that there is a great distinction between whether Congress can regulate production as such and whether Congress can regulate conditions which might interfere with the transportation of agricultural products after produced.

I will say this: That although this act does not apply to agricultural production, probably, if Congress had undertaken to control situations that had for their purpose the stopping of such production, the same rule would apply. Fortunately, we do not have to reach that far in this case.

The present decree directs that these parties cease and desist from interfering with the organization of their employees; that they cease and desist from discrimination in regard to their employees; that they restore to their places the men who have been discharged; and that they post notices. I direct myself now at the question whether such orders are a denial of due process.

We take the position that insofar as the decree forbids interference with the organization of respondent's employees the question has been resolved in favor of the act by *Texas & New Orleans R. Co.* v. *Brotherhood* (281 U. S. 548). That is controverted in respondent's brief. It is their contention, as I understand it, that the *Texas case* did not decide that it was within the power of Congress under the due-process clause to interfere with employer-employee relationships; that the men were ordered reinstated in the *Texas case* as a punishment for a violation of a temporary injunction which had been entered against the employer, and that there has been no consideration, and certainly no conclusion by this Court, as to whether the order of reinstatement of a man discharged for any reason or without reason is within the power of Congress.

Our contention is that the *Texas case* decided that the order was not a denial of due process when the congressional interference with the right of discharge was part of a scheme of voluntary labor conciliation. Our reason for that statement is this: The temporary injunction which was entered in the *Texas case* was in almost the exact language of the Railway Labor Act. There was no prohibition against discharging an employee. There was no reference to that situation. It was simply an injunction against interference with the organization of the employees of railroads.

With that injunction in effect, the railroad then discharged employees, and it was called upon to purge itself of that contempt. Those discharges would not have been a violation of the injunction unless they were also a violation of the act. The injunction and the act being in similar language, and the railroad being punished for violation of the injunction, necessarily this Court concluded that the violation of the injunction was a violation of the act, and that a violation of the act by interfering with employees was consummated by the discharge of certain employees.

We do not contend that the *Texas case* determines whether it is a violation of due process to require a man to be reinstated by an employer who has violated an act such as the Railway Labor Act or this act. It was not necessary under that decision for this Court to determine that the employer must restore the employee to his place,

because of course that might have been only a method of purging the employer of his contempt.

We do say, however, that it is consistent with due process to require reinstatement of an employee by an employer who has violated a constitutional act and has interfered with the organization of his employees by discrimination against union employees in their discharge—we say that that, while not definitely and finally ruled upon by this Court, is within the due-process clause.

That brings me to a consideration of the second series of cases which, like the *Carter case*, I think are at the heart of this particular controversy. I refer, of course, to *Adair* v. *United States* (208 U. S. 161), and *Coppage* v. *Kansas* (236 U. S. 1).

We do not think that the *Coppage* or the *Adair cases* are necessarily overruled by the *Texas case*. We realize that that case throws a grave doubt upon their validity, but the same problem that arises as to whether or not interstate commerce is directly affected by these acts comes up under this due process clause. It arises because of the fact that in the *Coppage* and the *Adair cases* we had legislation which was directed not at a complete scheme, not at the protection of the rights of the employees, but was directed at the right of the employer to discharge or hire such employees as he pleased for any reason which he pleased.

I know, of course, that the Erdman Act (30 Stat. 424), which was involved in the *Adair case* had a somewhat broader scope than the purpose which I have just stated, but a careful examination of the *Adair case* will show that this Court considered only section 10 of that act, and that the opinion is written and the language is directed at the violation of due process in undertaking to interfere with the employer-employee relationship as such.

In the *Coppage case* a different situation developed, and of course it was taken up under the fourteenth amendment. But in the *Coppage case* itself this Court pointed out that it was not determining whether or not the coercive provisions of the Kansas act were applicable to the situation or not, and it says:

> We do not mean to say * * * that a State may not properly exert its police power to prevent coercion on the part of employers toward employees, or vice versa.

And in the *Texas case* there is implicit in the language of the Chief Justice the distinction which I am seeking to draw. He said that the *Coppage* and the *Adair cases* were directed at the right of the employer to select its employees, while the Railway Labor Act—

> is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selection, they cannot complain of the statute on constitutional grounds.

Therefore, we submit that the *Adair* and the *Coppage cases* are not a bar to this act; that whatever interference to the employee-employer relationship there is in saying that a man cannot be discharged because of his association with a labor union or because of the undertaking of the employer to destroy that union is different from that in the *Coppage* and *Adair cases*.

It is our view that the interferences with the rights of employers which are implicit in this act are interferences which, under the doctrine of due process so frequently declared by this Court, are reasonable

and proper in their character and are not capricious. They are aimed at a situation which is within the power of Congress to control in protecting the commerce of the country from these recurring and huge dislocations arising from the various strikes that afflict the Nation.

We leave to the employer all the natural rights which he needs to regulate and operate his business. He is not forbidden to discharge an employee. He is forbidden to discharge him for only one thing—his labor relations. The employer has great powers, of course. The employee has been permitted, and I believe that this Court has approved, unionization and collective bargaining and ordinary labor activities. The workman has been found to have rights—rights of organization to protect himself against the overwhelming material force of the employer. To ask the employer to give up but a trifle of the power which he has, to compel him to keep his hands from the labor organizations of his workmen, is, in our view, not a deprivation of any liberty or property which is beyond a reasonable interpretation of due process.

That covers the contention of the Government in this case. We feel that through this act there has been an exercise of the power of Congress to regulate and protect interstate commerce from obstructions that have a direct and immediate effect upon it. The word "direct" runs through all the cases in regard to the power of Congress under the commerce clause. If it is possible to compress the entire philosophy of the power of Congress over commerce into one word, I presume that the word "direct" supplies the need as well as any that could be chosen. And yet a word is something more than six letters of the alphabet. It has connotations—connotations that bring to our mind the use of this power of Congress in many situations: To regulate the grain and the cotton exchanges, to regulate the movement of interstate commerce through the "throat" of the stockyards, and to enable Congress to stop water at the headwaters of the river to protect the river that bore the commerce that was within their protecting power.

Here we feel that this act is brought forward for the purpose of protecting, just as directly, that great commerce from the interruptions of labor activities and controversies which have caused losses of staggering amounts, which of course have an effect upon commerce enormous in its magnitude and in its difficulties, and which we believe are sufficiently within the connotation of the word "direct" to justify this Court in reversing the decision in this case.

(Whereupon, at 4:30 o'clock p. m. an adjournment was taken until 12 o'clock m. of the following day, Thursday, February 11, 1937.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

ORAL ARGUMENT

WASHINGTON, D. C.,
Thursday, February 11, 1937.

The oral argument in the above-entitled cause was resumed before the Chief Justice and Associate Justices of the Supreme Court of the United States at 12 M.

Appearances:

On behalf of the petitioner: Hon. Stanley Reed, Solicitor General of the United States; Hon. J. Warren Madden, Chairman, National Labor Relations Board.

On behalf of the respondent: Mr. Earl F. Reed, Mr. Charles Rosen, Mr. W. D. Evans, and Mr. John E. Laughlin, Jr.

The CHIEF JUSTICE. Proceed with the case on argument, No. 419, National Labor Relations Board against Jones & Laughlin Steel Corporation.

ORAL ARGUMENT ON BEHALF OF JONES & LAUGHLIN STEEL CORPORATION

Mr. EARL F. REED. With the permission of the Court, the complaint in this case charged the respondent with having demoted 1 individual and discharged 12 for union activities, and the persuasive oratory of Government counsel has magnified this discharge of 12 persons into some national calamity to stop the streams of commerce. I think we must get back to the facts of this case and then see the application of the statute.

First I want to discuss one statement made by Mr. Madden with respect to the objections raised by the respondent before the Board. He stated that it objected under the first amendment. That was not correct. The objection, however, was made in addition to those which have been discussed, that the judicial power was vested in constitutional courts under the third article of the Constitution, and that

the procedure of the Board was a deprivation of the rights of the respondent.

The picture of the manufacturing operations of the respondent given by the learned Chairman of the Board, Mr. Madden, in his presentation of his part of the Government's case was not quite as full as is required to understand the attempted comparison of the "stream of commerce" theory with that of the stockyards and the grain exchange. The coal that comes into the plant is stored. There are large stocks on hand at all times and a supply that would run the mills for 2 or 3 months. The ore that comes down from the mines by independent carriers is stored in stock piles, and there is at all times on hand enough ore to operate the mill for 8 or 9 months. The limestone is also brought in and stored. The manufacturing operations are in no sense a continuous process. The coal is made into coke first, which is not sold, but the coke is used in the blast furnaces in the melting of pig iron.

The manufacturing process up to the production of pig iron is conducted entirely without any relation to any existing orders or chemical analyses or anything of that kind. The first and distinct process in the manufacture is the production of pig iron. From then on, as it goes into the melting furnaces, there may be specifications that are applicable to a particular order. But the manufacturing process as a whole is two distinct operations, and there is no similarity whatsoever to the product taken in at one end of the mill and that which is produced and sold.

There are some sales at various stages of semifinished material, which the evidence shows is practically all sold in the Pittsburgh district to other manufacturers; but in the long run, the great mass of the production of this company is pipe and nails and sheets and tin plate and the finished products of a steel mill.

The facts relating to the discharge of the employees have, it seems to me, some bearing upon the decree entered in this case. Although the discharge related to 13, evidence was produced only with respect to 10. Two of them were motor inspectors, one of them was a tractor driver, three of them were crane operators, one of them was a washer in the coke plant, and three were laborers.

As stated to you by Mr. Madden, the company, after putting in the defense that related to its process of manufacture and its objection that it was not engaged in interstate commerce, withdrew from the hearing. So that the balance of the testimony and the great bulk of the record was made in an ex-parte hearing. And yet, in spite of that fact, the disclosure by the witnesses showed the various causes for which their discharges had been made.

A man named Volpe had been discharged because he had refused to work on Sunday. He had been laid off on numerous occasions before because he had lifted badly loaded pipe which might have fallen and injured people.

A man named Phillips, a motor inspector, was discharged because he failed to answer two whistles, which was his duty when called to inspect a motor which was out of commission. These are the statements admitted by the men themselves in an ex-parte hearing.

Cox, a crane man, was discharged because he started his crane without testing the stop limits. The rules were that before the operation of a crane was undertaken the limits should be tested to see whether or not the load might drop on the floor or strike the ceiling, and he said and testified at length that he knew better than the foreman what was the proper way to test a crane, and admitted that he did not do it.

A man named Boyer, who was a nail manufacturer, was discharged because there was a large quantity of bad nails found in the buggy in which he put his product. There was a dispute as to whether he put them there or his companion put them there, and the Board found that the discharge was not justified.

A man named Brandy, a coal washer, was discharged because on two separate occasions when samples of his work were taken and tested they were found to be defective, and he had been laid off on occasions before.

So that, without going through them all, I can say this, that each man admitted that there was some cause for his discharge, and each of them claimed that other persons who had committed similar offenses had not been so severely punished and that he believed, or he felt, that it was because of his membership in the union that he was being discharged.

The evidence referred to by Mr. Madden as to the intimidation by the company was not stated in its correct atmosphere. None of these things occurred after this act was passed, and the only evidence in this case of any undue intimidation or any effort to influence the men were some asserted statements before this act ever passed, by the various foremen, that the union would not accomplish anything, or a man would not get anywhere in the union; and statements made that the police authorities of the city, which was an independent municipality, had not fairly treated labor organizations, and the responsibility for everything that happened in the community, for everything done by a police officer, was laid at the door of the company in this ex-parte hearing. The secretary of labor of the Commonwealth of Pennsylvania was allowed to testify to statements made in affidavits filed with her long before this act passed, alleging that the company had not been fair to union people, and they did not even point out that that very subject matter had been heard by a prior labor board appointed under the joint resolution of Congress, and the company exonerated.

So that you go into the facts of this case with the finding here, even ex parte, that the conclusion that this was done because of union activities is based upon the flimsiest kind of evidence; and what the petition really amounts to is that Mr. Madden and his Labor Board did not agree with the superintendents of the company as to the sufficiency of the causes for which they discharged the employees.

Then, the record abounds with a mass of hypothetical testimony, hundreds of pages of it. After this hearing in Pittsburgh they consolidated this hearing with that of two other companies, the Wheeling Steel Corporation and the Crucible, and they held hearings in Washington here for days, in which various persons came forward and gave a great deal of hypothetical testimony—labor persons who said they believe that organized labor and national unions were a good thing for labor. The Board took judicial notice of theses written by professors in colleges about the advantages of union labor, of declarations made years ago—it was in evidence what Judge Gary had said in 1892 about the unions—and all it amounted to was a vast mass

of opinion evidence that national unions would be a good thing for workers.

And it was not confined to the steel industry. They went into the producing industries. They offered colleges theses. They offered public records. They even offered The Steel Dictator, a book written by Harvey O'Connor, as evidence to show that the stoppage of business and commerce was in large part due to strikes.

It was on the basis of that testimony that the Board found that a labor dispute in the steel industry would interrupt commerce. This company was not shut down in 1919 when the labor strife occurred. It operated throughout. It has had no labor disturbance since 1892, but all these other intervening labor disturbances were used to show that they had a tendency to interrupt commerce.

The decision of the Board was made; and before the company was notified, an application for its enforcement was made to the Fifth Circuit Court of Appeals in New Orleans, where the company had a warehouse, although the plant was in Pittsburgh, the laborers are in Pittsburgh, about 22,000 men work there, and the officers were there—and yet the Board goes to New Orleans for a petition for the enforcement of the act. They had to go down there and say that we had not complied with it, but at the time of the application they could not say that we had not complied with it, because we had not even been notified about the order requiring the reinstatement of the men.

Now, it seems to me that there can be no doubt that the company is entitled to a review on the jurisdictional question. It is suggested in the petitioner's brief that since the act makes its findings on matters of fact final, it has found that this disturbance had a tendency to interrupt interstate commerce, and therefore that is conclusive.

Under the decisions *Crowell* v. *Benson* (285 U. S. 22) and *St. Joseph Stock Yards Co.* v. *United States* (298 U. S. 38) it seems to me there can be no doubt that the jurisdictional question of whether or not this company is engaged in interstate commerce is one that we are entitled to have reviewed. I will pass that. It is covered in the brief.

The National Labor Relations Act, we contend, is on its face a regulation of labor and not any effort to regulate commerce among the States or to remove obstructions to commerce among the States.

Mr. Davis the other day went over the act in quite some detail, and I do not intend to do that again. I do want to point out one or two things about the act which I think were perhaps not sufficiently covered, which indicate that it is wholly an attempt of Congress to intrude itself into the industrial relations of what has been traditionally regarded as a State matter. In the first place, in the legislative history of this type of legislation the first effort that Congress made to regulate labor matters at all was in the Railway Labor Act of 1888, which was reenacted and enlarged in 1926 and amended in 1934. Then in 1932 came the Norris-LaGuardia Act, which curtailed the power of the courts on certain labor matters, and the substance of the acts and what was attempted in the way of encouraging national organization of employees throughout this train of legislation is practically the same.

When the amendments to the Bankruptcy Act were passed in '33 and '34 they again attempted to endorse a national organization of employees, in that they prevented funds in bankruptcy matters and labor-organization matters being used in any way to contribute to the support of plant or local or so-called company unions.

Now it cannot be said that Congress in the Norris-LaGuardia Act was trying to prevent the interruption of commerce by strikes, nor in the Bankruptcy Act. The real purpose of Congress, as shown by the attempt to hitch those matters onto the Norris-LaGuardia Act and the Bankruptcy Act, and again in the National Recovery Act, was that Congress was trying to regulate labor relations, and that is what they are trying to do here, and it is merely a matter of verbiage to try to hitch them onto them on the theory that it is really to remove obstructions to commerce.

An examination of the act itself reveals that. The closed shop is made legal. You cannot force a man not to belong to a union, but you may force a man to join a union; and then you may not contribute any support to a local or plant union, no matter if it has been in existence for many years, no matter if you have a contract with it that you are to pay a certain amount annually; and here is a form of organization of employees that has been successful in Europe, that has been existing in this country since 1904, and successfully in many places, and yet you are forbidden under this act to make any contribution to that.

Does that indicate an effort to remove the obstructions to commerce? To my mind, it indicates an effort on the part of Congress to force national organization in industry. It is a clear indication of the purpose of Congress to prevent local unions, prevent plant organizations, and compel employees to join national organizations. The provisions about the majority rule are for the same purpose. It is all right to say that a closed shop is not forced upon anybody, he must agree to it, but when the act says that no minority group can bargain at all, it amounts to the same thing, because the minority union in a plant is not going to exist very long if it cannot obtain anything for its members, if it cannot negotiate with the management.

Here the determination of the unit is entirely up to the Board. Suppose the Board determines that the whole of the employees in the coal industry is the proper bargaining unit. You may be situated in a plant in which not a man belongs to that union, but you are bound by the determination of the majority, because the Board has found that that is the proper unit. The Board may have found that all of your employees are the proper unit, and not one of your electrician or mechanical men may belong to that unit. They may have their own union. Yet you are forbidden by this act to deal with that group, because they are a minority group.

Did that indicate a purpose on the part of Congress to free commerce from obstruction? Nothing of the kind. It indicates the congressional purpose to force national unions upon industry, and the act is sweeping in its language. It purports to cover all industry, and it is exactly what was intended.

It won't do to say that collective bargaining is not involved in this case. The theory is that the discharges discourage organization, that organization promotes collective bargaining, and that collective bargaining prevents industrial disturbances. So that we do have to consider, and the Court has to consider, what is the main and primary purpose of this act. Is it to remove obstructions to commerce, or is it to govern labor in industry? It seems to me there can be no conclusion other than it is an attempt to enact sweeping, broad legislation over the labor matters of industry generally. And that was the trend

of testimony in the case. The testimony throughout and all this evidence that was offered in the joint hearing is along that very line.

The fact that the act is by its terms confined in its application to matters affecting commerce does not change the situation. You cannot change the things which are not interstate commerce into things which are by the use of words. If you say that it must be something affecting commerce, there is no limit. It seems to me that anything affects commerce, and that the question then comes only as to the application in this particular case as to whether or not the connection is direct or remote.

The fact that we receive materials in interstate commerce or that we ship our products out in interstate commerce cannot make any difference. There is no use of my going over those cases. That is true of every manufacturing industry. The fact of the matter is the steel industry probably receives its products in a rawer form and gives a greater trasnformation to them when they are shipped out than almost any other industry. There are hundreds of industries in the Pittsburgh district that take nothing but one shape of steel and turn out another, and their incoming product is much more similar to their outgoing product than it is in the steel industry.

I think the language of this Court in *Heisler* v. *Thomas Colliery Co.* (260 U. S. 245) as to what would be the effect of holding that the prior movement in interstate commerce or subsequent movement in interstate commerce both bring it within interstate commerce covers the situation better than any argument.

> The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.

The Government argues that it is in the stream of commerce. I shall not go into that except to point out this, that in *Stafford* v. *Wallace* and in *Board of Trade* v. *Olsen* the evidence and the matters before Congress showed beyond any doubt that these were select focal points in which practically all of the commerce passed. This mill is not in any way stationed in the stream of commerce. This plant, into which we take coal and coke and limestone and turn out steel, is not any mere temporary stoppage in a stream of commerce coming from the West to the East. It is not comparable, and because Congress could regulate stockyards, it is a far cry to say that they could regulate the labor relations of an industry like the steel industry.

The Government argues that there is the possibility of an intention on the part of the strikers to obstruct interstate commerce. It seems to me that that argument weakens the connection. In the stockyards cases, in *Swift & Co.* v. *United States* (196 U. S. 375), the intent to obstruct interstate commerce was clear, proven. The stockyards were regulated on the theory that they might be used

as an instrumentality in monopoly. But here the intention that the Government ascribes is an intention on the part of the strikers to interrupt interstate commerce, an intention on the part of a third party, an intervening agency. They do not claim that in discharging 10 men we had any intention of creating a controversy that might obstruct interstate commerce, but the fact of these discharges might lead to dissatisfaction, which might lead to a dispute of more serious consequences, which might result in a walk-out, in which the strikers might have an intention to interrupt or change the stream of interstate commerce.

Now, if that reasoning applies, there is not any reason why Congress cannot regulate every activity relating to manufacture. It is just as reasonable to say that, if we do not treat the men properly with respect to workmen's compensation law, if we do not have proper sanitary conditions, or hours of labor. or of everything else, the net result of which may be that there will be a strike, in which there will be an intent on the part of the strikers to obstruct interstate commerce, such an act would apply.

Mr. Madden pointed out that one of the witnesses testified that he was told that he would have to pay his back rent if he joined the union. I don't see any reason why, if this be sound, Congress cannot regulate our rent relations with our employees, because dissatisfaction on the part of employees who live in our houses may result in a dissatisfaction of some kind that may result in a labor dispute where the intent may be present to interrupt interstate commerce

Now, if we ever get to the place where we are having such remote, indirect causes prevail to enable Congress to regulate manufacturing industries, there is no limit to it. This theory that the discharge of these men can have such an effect upon interstate commerce is so remote that the possibility of other means of regulation is unlimited.

We raised the question before the Board, and we raise it in our brief, on the procedural sections of this statute. I do not intend to argue it at length. It is covered in the brief.

I do want to make this observation, however, that the statute purports to give to this Board original and exclusive jurisdiction in these matters, and it is said that we objected before the Board and the circuit court that the Board was constituted an investigator and a prosecutor and a judge at the same time, and the answer was made that that was similar to the proceedings of the Federal Trade Commission. I want to point out, however, that the Federal Trade Commission does not render any decisions in private matters at all. Its decrees are negative. They are only when public rights are involved, and they leave the parties to the law to adjust their private differences. The scope of the appended order in this case is entirely different. It seeks to adjudicate private rights, enter a money judgment for the back wages, and otherwise carry out the rights between individual parties.

We raised also before the Board, and now, the question of the violation of the fifth amendment by this decision. The case of *Adair* v. *United States* (208 U. S. 161) decided flatly that a man had a right to hire whom he wished, and that a statute which forbade the discharge of an employee for union activities was unconstitutional.

The same substantive decision was made in *Coppage* v. *Kansas* (236 U. S. 1), and now it is said that the *Texas & New Orleans* decision modified or at least cast some doubt as to those decisions.

There is this to be observed about the *Texas & New Orleans case:* It was a case in which the railroad had voluntarily entered into arbitration and the arbitration was proceeding before the Railroad Mediation Board. The order made requiring the restoration of the employees was made and seemed to be made because they had been discharged after the voluntary mediation had begun, and the court pointed out that there was no attempt to interfere with the normal hiring or firing of employees, but that the order was being made to require the railroad to purge itself of the contempt shown by the discharge and the efforts that were made after the mediation started to create and bring into existence a new labor organization which would be more favorable to the company than the one with which it had begun the mediation.

Now, in this case the order is made flatly that we reinstate these 10 employees. The Solicitor General says that if they were restored then it would be a hiring at will; that the minute they came back to work they would be working for us at a hiring at will, when they could be discharged for any reason or no reason.

It is difficult for me to see why, if they could have been discharged for no reason, their restoration could be ordered because the Labor Board did not agree with the sufficiency of the reason for which they were discharged.

Justice SUTHERLAND. I did not quite understand the Solicitor General to take that position. I understood that his position was that he could not be discharged because he belonged to a labor union.

Mr. EARL F. REED. I understood him to say in answer to the Justice's question that it would be a hiring at will, that if they came back their tenure would be at will, and I am assuming that a hiring at will entitles the employer to discharge for any cause or no cause. That much I may be adding myself.

Justice SUTHERLAND. I understood him to make that exception.

Mr. EARL F. REED. I should think that that exception would follow. In other words, I certainly think that if this act is valid it means that when the 10 men come back they cannot be discharged except for a cause which would seem sufficient to the Labor Board. Certainly it does not mean that they could be discharged right away, because the same complaint would be made again.

The fact that these men were intended to be taken back and kept is evidenced by this unusual provision in the order. The Board ordered not only the restoration and the payment of the back pay, but that the company should post a notice that it "will not discharge or in any manner discriminate against members of or those desiring to become members of Beaver Valley Lodge No. 200, Amalgamated Association", and so forth.

Justice VAN DEVANTER. You mean that it could not discharge them for any reasons or that they could not be discharged because of that?

Mr. EARL F. REED. The language of the order that we were required to post by order of the Labor Board was that—I am quoting—

> will not discharge or in any manner discriminate against members of or those desiring to become members of Beaver Valley Lodge No. 200, Amalgamated Association of Iron, Steel and Tin Workers of North America, or persons assisting said organizations or otherwise engaging in union activities.

The posting of that notice in the mill of the Jones & Laughlin Steel Corporation would have meant that all discipline and control over the men in that organization was gone. The restoration of 10 men was a vastly more important thing than the wages involved. If it were announced, if it were known, as it would be, to 22,000 employees, that 10 men who had been discharged over a period of 6 months, who belonged to the union, had to be taken back and put back to work and had their positions, and could not be discharged except upon a hearing before the Labor Board, all freedom of contract, all right to manage your own business, is gone.

Those men, if that be the law, if they can come back into this organization and go back to work for us, have a civil-service status. They stand differently from any other employee in our employ, because they cannot be discharged without a hearing.

Suppose their department shuts down. I suppose we have to go back to the Labor Board and ask to reopen this decree and show that they would not have had work if they had been working. Suppose they are tendered some other work that they do not want. In one of these discharge cases the man thought he was not equal to handling the machine that he had and he asked for something else, and in another a man had been absent a great many times. Under this decree this money judgment goes into effect and we pay them these back wages indefinitely, apparently.

Suppose we want to transfer him to another department. Then I guess we have got to go to the Labor Board and show them that we have good ground for transferring that man and we want the thing modified so that we can put him in another department.

Suppose there is a question of promotion. There is no reason for not applying it to promotions. Daily they are making complaints that a man promoted is a nonunion man and therefore it was a discrimination. I suppose every time we wanted to promote a man we would have to go back to the Board and ask them to reopen this decree and let us promote the man.

Now, an employer has to have discretion. He cannot always give a reason for a discharge. There are times when sabotage occurs, times when there is theft, and he cannot fasten the responsibility. There are men who are just a disorganizing influence and have to be transferred. There are men who have no promise of ability, who cannot either maintain or operate a machine, or who are a constant menace to their fellow employees. Is the discretion of the management to be reviewed every time the man discharged happens to be a union man? Here are 22,000 employees, and 10 of them over 6 months discharged that happen to be members of the union, and we are hauled into court and have to trial to show why we discharged those 10 men. Is that an interference with the right of freedom of contract? Is that an interference with the right to run our business as we think best?

It seems to me that the Government's argument comes down to an economic argument. "It would be a good thing," says Mr. Madden, "If the Federal Government could control the labor relations of industry." But that is not the law, and never has been. He may think that the States are handling it "stupdily", as he says. He may think that a centralized government in which the Federal Government controls all of the labor relations of industry is desired. That is not the law and never has been.

138858—37——10

For a century this Court has adhered to the simple, literal meaning which Marshall found in the commerce clause, that Congress has power to regulate commerce among the States. It has given assurance to the States when their taxing statutes have arisen that their rights shall be as the Constitution fixes them. The taxing authority or the police power of the States has been protected, and the rights of individuals to maintain their own property have been protected.

What the petitioner is asking is that the traditions and precedents of a century be cast aside and that we change the meaning of the Constitution by a judicial decree and say that things that for a century have not been the business of the Federal Government are now to be subject to regulation, because of the remote possibility that these discharges and things of this kind may obstruct commerce.

The CHIEF JUSTICE. That is all on your side. Anything more on your side?

Mr. STANLEY REED. That is all, Your Honor.

(Whereupon, at 1:25 p. m., the oral arguments were concluded.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 420

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRUEHAUF TRAILER COMPANY, RESPONDENT

No. 421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRUEHAUF TRAILER COMPANY, RESPONDENT

ORAL ARGUMENTS

WASHINGTON, D. C.,
Thursday, February 11, 1937.

Oral arguments in the above-entitled cause were begun before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 1:25 p. m.

Appearances:

On behalf of the petitioner: Hon. Stanley Reed, Solicitor General of the United States.

On behalf of respondent: Mr. Thomas G. Long, Mr. Victor W. Klein.

The CHIEF JUSTICE. Nos. 420 and 421, National Labor Relations Board against Fruehauf Trailer Co.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. REED. If the Court please, the Government's statement in this case will be extremely brief. We have already, I believe, covered the issues as made by the briefs and as made from the facts as we understand them.

This is another industrial enterprise in which there were activities that were found to violate the provisions of this act. The Fruehauf Trailer Co. is a Detroit manufacturer of the modern trailer that goes behind the automobile. It is a typical American industry, in which the founder was almost the sole worker in a carpenter shop or wagon works back in the days before the automobile. Through his own

industry and activity he has developed this business, which has grown from a small enterprise into one employing some 700 or 800 men, and is the largest producer of trailers in the United States. The next closest produces only 37 percent as much as this particular manufacturer.

The enterprise is, as I said, located in Detroit, and gathers into its factory from the various parts of the country the material for its trailers. Part of that material comes already fabricated, like tires and wheels and the various accessories of the trailer industry. Other materials come in the form of iron, or steel, or lumber, and are fabricated in the shop.

This enterprise ships 80 percent of its product outside of the State. It has 31 sales agencies throughout the country in 12 or more States. Its goods are consigned to those States for sale, the title to remain in the seller until after the product is sold. It has in cooperation with its business a financial instrumentality which finances the sales for the purchasers until they are paid for in cash, the credit terms being approved in the Detroit office. It has its Canadian agency which conducts the sales there.

Something over 50 percent of its raw product comes from out of the State. In other words, this is a typical enterprise of large proportions in its particular line of activity. It is the largest trailer manufacturer, selling something over $3,000,000 worth of goods at the time of this hearing. Its sales at this time we do not know, except from the fact that they were rapidly increasing at the time the hearing was held.

There are no peculiarities in regard to the industry itself. Almost the naming of it will give Your Honors a conception of the enterprise itself.

This enterprise had not had any great labor difficulties. I believe the record shows that there had been no strikes in the organization, certainly not during the last few years. It cooperated with the National Industrial Recovery Act so long as that was in effect. With the collapse of that act, there was renewed labor activity in the factory and an undertaking to organize the employees into a union. This was opposed by the manufacturer as being unnecessary for the interests of his employees for he had always been a kind employer, ready to listen to the complaints of the individual employees who might protest, or might come to him for help, in sickness or in distress.

To be assured that there should be no unwarranted development of labor unions, this manufacturer employed a detective, who, in order that his activities might not be known, was placed upon the pay roll. So well did he perform his functions that he became the treasurer of the labor union, which is the one office that has the entire list of the employees, and he handed that list regularly to the superintendent of the plant.

The evidence is that the manufacturer, after being armed with the knowledge of the names of the particular employees that were members, discharged many of them, sometimes for some reason—often for no reason. The record shows that many times they were told that they could give up either their union or the company. When I say "many" I mean that there were many instances of statements of that kind, but that particular phrase comes from one of the witnesses.

Under those circumstances we think that this case is quite similar in all its legal aspects to those that Your Honors have had presented

to you, and without going again into the questions of law that have been discussed, we will await the statements of the counsel on the other side.

ORAL ARGUMENT ON BEHALF OF RESPONDENT

Mr. LONG. May it please the Court, I would like to correct one impression right at the start.

Justice BUTLER. I can't hear you.

Mr. LONG. I will be a little louder. We are not concerned here with the trailer that you attach to an automobile and go off touring in, not the thing about which there is a question as to whether it is a house or a wagon, that we have had up in our State. This is a trailer which handles merchandise, which is seen going through the streets, a four-wheel trailer behind a large truck, with a fifth-wheel arrangement. This is the two-wheeled trailer without a body. That is the thing that we are talking about here.

Now, it is obvious that the legal questions involved here are the same legal questions that we have been listening to now for two days. Your Honors have listened with great patience, and I would almost feel that Your Honors had heard enough of them, but each case has its own particular facts.

This business, while it is the largest in the country, is, in comparison with Jones & Laughlin, just a small business. We employ 700 men in the manufacturing department and about 200 more, and that is the extent of the business.

While our briefs rely upon all of the legal questions presented, I shall endeavor to confine myself almost entirely to the interstate-commerce question, with just a little touching over onto the due-process question.

The due-process question has really two aspects, the procedural aspect and the substantive law aspect. This act says on its face that the findings under it shall be conclusive, and if that is taken at its word then we are denied an inquiry into the findings, directly contrary to the case of *Crowell* v. *Benson* (285 U. S. 22).

I shall assume in what discussion I shall go into that, as to the question whether we are engaged in interstate commerce, we are entitled to the independent judgment of the Court upon the facts as well as the law, and as I go along I will point out that, if there be any question of fact involved here which does not go to jurisdiction, upon that question of fact the finding is arbitrary, capricious, and without the slightest foundation in the record.

Fifty percent of the materials used by this plant come into the State of Michigan in interstate commerce. Eighty percent of the product goes out of the State of Michigan, sold elsewhere. The seven employees that are here involved were all in production. They had nothing to do with the purchase, receipt, or handling of the materials. They had nothing to do with the sale and the delivery of the product. They are in production, three of them in the frame shop, one in the assembly shop, and three in the body shop.

This business began back in 1897. Mr. August Fruehauf had a little blacksmith shop and a wagon shop; they almost went together in those days. The picture of it is in the record as exhibit 2, which shows this little shop, just a typical blacksmith shop. He went along on the even tenor of his ways, and the automobile, the motorcar came

along, and he conceived the idea that, along with the sort of business he was qualified to do, he could make a trailer to be put on behind the truck, with two wheels, or to be put on behind a tractor, with four wheels, and that he could increase the usefulness of the truck and the tractor a great deal, and thereby he could build up a business.

So he started in at that. He had a number of sons coming along and he could make opportunity for them. He could also take in his sons-in-law. So he got the business up to the point where this inquiry came along—700 men employed in production and about 200 others. They had never had any labor troubles, never in the world. The chairman asked the production manager this question:

What would be the effect upon interstate commerce of a successful strike in those departments of your plant where these men named in the complaint work?

Answer. Well, I don't know, Mr. Chairman. I can not imagine anything like that. We have never had a delay of any kind in our operations, and I do not know just what the result would be.

They pay the highest wages in the industry. Between the depth of the depression in 1933 and the time of the hearing here it was testified that they had five increases in wages, several of which were factory-wide. Not only do they pay the highest wages in the industry, but they furnish the most continuous employment. Your Honors will see that the trailer industry is not subject to the seasonal fluctuations like other industries. It is a very stable business. So that they furnish good employment to their men. They have gone along, as their production manager testified, on that basis, and they have built up the company and its business on the principle that production and efficiency increase where employees are earning good wages and are satisfied. They have a rule in their factory that the men, even these men that made the complaint, said they knew of and acted under—"If you don't get satisfaction out of your foreman, come in and see the superintendent." And they admitted that was done. They admitted that they were fairly treated in that way, and even where in their private lives they had problems they were encouraged to come in and discuss them with the employer, and that they were frequently helped by the employer in doing that.

They questioned these two men as to the treatment of them. They said that the company had treated them fine, had treated them well.

This was the situation that had developed over the years till legislation of this nature came along. Then what developed? Outside organizers came along, began to agitate, began to foment disturbance, and, as counsel said, the company thought it expedient to get somebody to find out what it was all about. They had never had any troubles, but here it came all of a sudden, concurrently with this type of legislation, which preceded the Labor Act, and the N. R. A. Act.

In this union the claim is that they had 177 active members, and, as the witness said, possibly 100 others who had paid some dues at some time or other.

But 277 is not many out of 700 employees. So the Board, in order to show that that is the majority, proceeded to find that we had only 400 employees, and here is the sort of testimony that was given. I want to use this just as an instance of their arbitrary and capricious findings. They asked one of these discharged employees:

How many employees did this company employ in the production and maintenance departments?

Answer. Well, I don't know. Of course, I have no definite figures. I don't see any reason why they can't find out from a better source than me, but I don't think they have over 400, or I don't think that many employees—that is, I don't mean bellhops or telephone operators or salesmen or people working outside the factory or people who were not eligible for our union. I mean just the factory workers, production workers.

And the Board finds that we had 400 employees, notwithstanding this same witness had placed before the Board a statement signed by him that there were 600, and notwithstanding the production manager said there were 700.

Now, that runs all through the findings. They finally got down to a meeting of this union and a common vote on whether they were going to strike or whether they were going to stay. I think but 35 of them voted to strike, but the rest of them voted not to strike, and so they didn't strike.

The production manager testified that after the discharges had been preferred there was no dissension created in the factory about it. They were going along on the even tenor of their ways, the same as they did before these agitators came along.

This discharge here has one characteristic different from what has been presented in the other cases. We did not discharge seven men only. There were 72 men discharged. Along in the summer of 1935, the testimony is, and Your Honors will remember it anyway, there was a decided slackening of industrial activity, and so it became necessary to reduce the force, a 10-percent reduction was put through, which took out 72 men, including 7 men who made the complaint that they had been let out because they were union men.

If you are going to reduce your force, it is not a question of this man being altogether better than that man or the other man worse. You may take into consideration many other things—how he has lived over the years, what family obligations he has, and all that sort of thing, or take into consideration nothing, if you please. We had to reduce our force.

But here we have a situation where the Labor Board says, "Well, yes, you had to reduce your force, but in letting these union men go you discriminated; but when you let the nonunion men go, why, we find no fault with that."

The officer testified specifically that in doing this lay-off the same standard was applied to union as to nonunion men, that union men were retained on the rolls as well as nonunion men, the determining factor being the efficiency of the workman, his cooperation, and whether or not he appeared to have the company's best interests at heart in performing his duties. On that principle they reduced their force by 10 percent.

Now, to spend a few moments on this matter of just how we conduct our business: First, there is the purchasing, receipt, and handling of materials. Those materials, some of them come in entirely raw, some rough, some partially finished, and some wholly finished. The axles, for instance, come in as rough, unfinished forgings. The bodies, all we get is the sheet steel and rough lumber. I might go on with others, but these are typical.

When the materials come in they are placed in the inventory or stock, call it what you will. They stay there a period of time varying from 1 to 4 months.

Here is an illustration of how the Board dealt with such a question as that. They make a finding this way [reading]:

> So closely are purchase, work, and shipments synchronized that on occasion work or shipment is delayed until required parts arrive to complete the assembly.

This is the sort of testimony on which they base such a finding as that. Here is the question:

> Is it not true in your case—not usually, perhaps, but is it not true that sometimes in your case you take materials that come in from a vendor and put them promptly into processing?
> Answer. Yes.
> Question. In order to continue an assembly or to complete an assembly that might have been started?
> Answer. That happens.
> Question. That happens?
> Answer. But in rare cases.

And then he went on again:

> Question. Is it not a fact that very often a trailer job is held up for a few days until you get the particular brake that the customer wants on it, or the particular wheel, or the particular rim that the customer wants on it?
> Answer. It would not happen very often.

And he finally winds up by saying that it is "very unusual", and yet they make the finding that characterizes the business as it is conducted in order to show that there is a flow.

Indeed, the seven men who are involved here had nothing to do with that part of the operations. They were in the manufacture, fashioning, of these various raw materials into this product. That operation is divided up into a good many parts. There is an engineering department with 25 or 30 men, a planning department with 20 or 30, and a tool department of 10 or 12 who make the tools which are used in making these things, and there is the machine shop with 125 men in which there is everything that you ever heard of in a machine shop. They are working on these materials. And there is the frame shop, the assembly department. As I say, three of these men were working in the frame shop. Possibly I should stop a minute to show what was done in the frame shop.

There it was a matter of punching, drilling, riveting, and welding operations that took place, and putting things together.

One of these men was in the assembling department, where all these things that have been made are brought and put together. That is where he worked. Three of them worked in body building. That was the largest department, 250 to 300 men in that department. Of course, there being no motor in our trailers, the body-building department is necessarily the largest department of the business.

It is in the record that in this process of manufacturing these trailers there are some 200 operations that the things have to go through. I don't mean that each one goes through 200, but there are 200 different operations to fashion them from these materials which finally come together to make a trailer.

Then we get to the matter of sales. There are 31 sales offices in Michigan and 12 other States. Then they also sell to distributors and dealers in the common way. They sell sometimes on consignment, for credit reasons, and yet the Board tries to show that that is a large part of the business. I don't know what difference it would make whether it were a large part of the business or not. That, in

general, is a description of the way our business is conducted, what we do there.

Now, it strikes me that to find immediacy here is to find it practically everywhere. I do not know a business that you could not find it in if you could find it here.

Your Honors will observe that the question which we have here is really the old question of States' rights as against national power. And I want in that connection to call attention to the fact, and spend a few minutes on it, that we are here dealing with a part of the automotive industry, an industry which is peculiar to the State of Michigan. The plants of the State of Michigan could supply the world if there were none other. They have that capacity. It is all located there. It is essentially a local industry.

I call attention to what this Court had to say about the situation of the development of local resources back in the *Minnesota Rate Cases* (230 U. S. 352) [reading]:

> The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.

The activity and growth of the Fruehauf Co., as I have outlined it here, are not peculiar to the Fruehauf Co. They are typical of the automotive industry, very typical. You could say the same thing of the Dodges, Fords, Olds, Chrysler, Nash, and so on. They all came up in the same way.

Now, I submit that it was for the State of Michigan to say whether the automobile industry would be developed in the State of Michigan under excessive restrictions or would be developed under freedom. The State of Michigan has permitted the automobile industry to develop and it has developed, to be one of the strongest industries in the country, proven by its recent comeback from the depression, leading all other businesses, because it has been known that it has been free. It has been the outstanding example of good employer-employee relations, with wages the highest of any businesses, and there never has been any trouble. Counsel who just spoke called attention to all the statistics and the history of strikes, and so forth, which the Government has in its briefs. They go away back. I make another objection to their statistics. Let them bring in statistics as to the automobile industry and let us see whether they will show about interruptions and disturbances, whether it is local or whether it is interstate.

The only one they mention in their brief is the Chevrolet strike in 1935, and that occurred after N. R. A. We had no troubles in the automobile industry to amount to anything until this sort of legislation began to come along, and I submit that what they are doing is interfering with the right of the State to say how businesses within itself shall be conducted.

Counsel on the other side objects that we argue the question too broadly; that we bring in too many provisions of the act; that we should confine ourselves to specific instances and particular provisions.

I object, Your Honors, to the way counsel on the other side uses the decisions of this Court. It has always been my understanding that

the language of a court is not to be read separate and apart from the circumstances of a particular case in relation to which that language is used. That was one of the first things I learned when I got out of law school into the practice of the law.

Now, you take the case of *Stafford* v. *Wallace* (258 U. S. 495), which related to stockyards, and they got to the point yesterday where this Court was considering something about the sale of sausage. Now, that was not involved in that case. That case involved stream of commerce all right, because that case involved commission men and dealers who were dealing with the livestock. It went into the stockyards as livestock, it came out of the stockyards as livestock, and whether or not it was going to be made into sausage has nothing to do with any question before this Court. And so that sort of thing has no application to the situation we have here, which is no such stream as that.

Again, they talk about *Chicago Board of Trade* v. *Olsen* (262 U. S. 1). Now, what did this Court say that case was all about. This Court said [reading]:

> The Chicago Board of Trade is the greatest grain market in the world. * * * Its report for 1922 shows that on that market in that year were made cash sales for some 350 millions of bushels of grain, most of which was shipped from States west and north of Illinois into Chicago, and was either stored temporarily in Chicago or was retained in cars and after sale was shipped in large part to eastern States and foreign countries. * * * The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago to points in eastern States with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate.

Here was a statute before this Court dealing with a commodity which was for the most part in the course of interstate commerce by the very acts of the parties on through bills of lading.

And then the only other circumstance there was that it dealt with futures. The question of futures, as I see it, was simply this: whether in making a contract which by its terms called for performance upon the Chicago Board of Trade, and could be performed upon the Chicago Board of Trade—that whether the fact that it was not expected to be performed upon the Chicago Board of Trade but to be settled as a future contract, took it out of the stream of commerce, and this Court said that it did not.

So much for the stream of commerce. Go now to the question whether in our operations we affect commerce, as that is used.

Upon that question, the Board concluded this, and if I may not weary Your Honors, but just take the time to read a few lines of what the Board says to give Your Honors an idea what the Board is doing in these cases. These are conclusions 44, 45, and 46—

> Any cessation or obstruction of operations at the respondent's Detroit factory necessarily has a direct, material, and substantial effect in burdening and obstructing commerce and the free flow of commerce between the State of Michigan * * * and other States in which it sells and to which it ships for sale trailers * * *.

The Chief Justice. I think you had better continue with that after recess.

(Whereupon, at 2 p. m., a recess was taken until 2:30 p. m. of the same day, at which time oral arguments were resumed as follows:)

ORAL ARGUMENT ON BEHALF OF RESPONDENT—Resumed

Mr. Long. At the recess I was about to pass to the discussion that we do not affect commerce, but I note that I have omitted one or two observations further that I wanted to make on the proposition that our manufacturing operations are not in commerce.

The fact that in making these different things for these trailers, there being about 40 different types of trailers, it is intended to find a market for them in other States, does not make our making of them a part of commerce.

Counsel on the other side in discussing that referred to *Oliver Iron Mining Co.* v. *Lord* (262 U. S. 172) and *Utah Power & Light Co.* v. *Pfost* (286 U. S. 165) by saying that they were tax cases. But this Court in the *Oliver Iron case* did not say, "We have put this aside because it is a tax case," but this Court said that mining is not commerce, and when it came to the *Utah Power case*, where the electricity leaves as soon as it is made, and cannot be held, this Court decided that by saying, "It is like unto the making of goods to special order for shipment in interstate commerce." So the basis of the reasoning of this Court is precisely in point.

Another proposition that the Board made much of was that the parties who order the trailers intend to use them in interstate commerce. Well, obviously, that has nothing to do with it. They spent a lot of time about the fact that we have registered trade marks for use in interstate commerce, but that has nothing to do with manufacturing.

Then they spent a lot of time about attaching the fifth wheel, and I just want to explain that. In our six-wheel arrangements, where we make the two rear wheels and body, it has to attach to the trailer; and it is attached by what they call a fifth wheel, which is nothing more than the old-fashioned bolster and kingpin, with a turntable; and they claim the fact that you have to have a fifth wheel and that very frequently we do attach that fifth wheel in the other State makes the thing interstate commerce.

Well, Your Honors, under the rule established by this Court as to when the doing of something at the end is or is not in interstate commerce—any of Your Honors or I could attach that fifth wheel; would not have any trouble about it—no skill involved in it; anybody that knows anything at all about the use of a wrench and a drill can attach that fifth wheel—I don't think I need spend any time in discussing that. But there are findings on those particular things.

So now, proceeding further to the question of whether we do affect commerce, and I read from finding no. 44 of the Board, and then they go on further, in finding 45:

> The aforesaid acts of the respondent caused unrest and confusion among the employees in the respondent's Detroit plant, which had the effect of burdening and obstructing commerce and the free flow of commerce between the State of Michigan * * * and other states in which it sells and to which it ships for sale trailers * * *.

And in their finding 46 they concluded that it—

> tended to lead to a labor dispute burdening and obstructing commerce and the free flow of commerce between the State of Michigan * * * and other States in which it sells and to which it ships for sale trailers * * *.

Now, that conclusion, as I get it, is this, that, while the manufacturing itself may be something local in character, nevertheless, if a labor

dispute were to arise and if the operations of these factories were to shut down as a result of the dispute, raw materials would not be shipped in, finished products would not be shipped out; thereby there would be a burden and obstruction on the free flow of commerce, and that unrest caused among the production employees therefore would have the effect of burdening and obstructing commerce, because those acts of unrest might lead to a labor dispute.

Now, that is a very, very tenuous series of arguments. It does not hold together. In fact, it seems to me that (*United Leather Workers* v. *Herkert & Meisel Trunk Co.* (265 U. S. 457) and the two *Coronado cases* (*United Mine Workers* v. *Coronado Coal Co.* (259 U. S. 344); *Coronado Coal Co.* v. *United Mine Workers* (268 U. S. 295)) dispose of that sort of argument, because the only difference in the two *Coronado cases* that I see is—the real effect was the same, but what they tried to do was a different thing, and they brought the one within and the other without interstate commerce.

As to what must be the relation to bring it within the term "affecting commerce" counsel on the other side make much of the use of the word "necessary", but they omit in most of their talk the use of the word "direct." This Court always couples the two together. Probably the best statement that this Court has made is in the *Coronado case*, where it said:

> intended to restrain commerce or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred.

Now, I take it that any act has a number of incidental effects which follow it, just as well as it has direct effects. It seems to me that the three building cases, of which *Industrial Association* v. *United States* (268 U. S. 64) is one, well exemplify the same. In each of these three cases the effect of the course of action complained of upon interstate commerce was to curtail the use in building of materials which to that time had been coming into the State and had been used in building. In the first and third cases this was an incidental result, albeit a necessary result, of the course of action complained of, while in the second case it was a direct result, the course of action complained of being directed solely and exclusively at materials which had been shipped in interstate commerce.

I have attempted to draw together just the several expressions made in different parts of the Government's brief in the *Jones & Laughlin case*, and give Your Honors an idea of the position of the Government. And Your Honors will appreciate that in their brief in this case they simply say that on all questions we rely upon our discussion in the *Jones & Laughlin case* and do not write an independent brief.

They discuss the question of "intent" and "necessary effect", and they say that those are two bases of what they call the "control power", and then they leave them away behind and proceed to push out the Federal power to include any situation which presents; I quote their words—

> a reasonable likelihood that a strike, if it occurred, would involve an intent to affect commerce—

Page 14 of their brief; that is, quoting again—

> such intention might reasonably be expected to develop.

It does not have the intention, but it might develop, and then the Board is to determine, as they put it—

> the probability of the occurrence of an evil which Congress could control—

And they explain that again, whether the situation is comparable to and of the same general type as those situations; quoting again—

> from which in the past there had evolved strikes with intent to affect commerce, or where such intention might reasonably be expected to develop.

And then they push out in still another direction and they say that the basis of their power is found, quoting—

> in recurring evils which in their totality constitute a burden on interstate commerce—

Though such evils arise from activities—

> usually of only local concern—

and this may extend to any situation, quoting again—

> where the reduction in the supply of the commodity is so large that an intent to burden and obstruct interstate commerce may be inferred.

That is the magnitude of the effect is deemed to bring it within the expression "necessary effect," though in all their discussions they recognize that in the first *Coronado case* it made no difference, quoting—

> whether the natural result would be to keep the preponderant part of the output of the mine from being shipped out of the State.

Now, that argument is just too tenuous to follow. It is something like the old nursery rhyme, "For the want of a nail," we have all these things that happen.

Now just a moment or two on the due-process question in the aspect of a substantive right. I would not take Your Honors' time on that but for two things. It has involved here a question in the due-process aspect which has bothered me for many years in my study of labor problems, and that is this: At just what point in the development of this business did the Fruehaufs lose their right to say who they would hire and who they would retain?

We begin back here with a little blacksmith shop, and the picture, exhibit 2, shows four men standing there, Mr. Fruehauf and his employees. We begin there, and he proceeds to build it up. He worked with the men, setting the tires and making repairs to the wagons, and so forth, and then he conceived the idea that he could make these trailers.

Now, when he conceived that idea I don't think that was wrong, that anybody would say it was. Then he conceived the idea that he could build up a large business, substantial large business, one that he could leave to his boys and his sons-in-law, for the benefit of his daughters, and he did build up a business, and he continued actively in the business, he employed his men, and I detailed this morning how he dealt with his men in that business.

In due course, as the business developed, he furnished more and more opportunity for more and more people to work, but I don't think that was a wrong, to furnish opportunity for more people to work.

But at just what point was it that he lost the right to say whom he should have and whom he should not have in his business?

Now, as he grew older his responsibility had to shift to the boys. They came along. The old gentleman here a year or two ago passed

away. The boys have the business. They do not have the absolute ownership. They had to get some money from the outside now and then. They had to induce one or two individuals to stay in their employ. But they still have a substantial control of the business and are conducting it.

And I ask again, "When did they lose this right to say whom they were going to have to work for them and whom they would let go"?

Carrying on a business in that way, with the best of relations with their employees, all of a sudden they are set upon by these outside organizers, and the Board which could inquire into anything it pleased, and the statute says they shall not be bound by any rules of evidence as to the relevancy of what they may inquire about. No one had to buy this product. No one had to work for them. They were not obligated to furnish any employment to anybody. And yet it said at this point they cannot say who they will employ and who they will not employ. In fact, the only right which this act leaves to these gentlemen, if it is to be applied as it reads and if the Board is to apply it, is that they can still talk to their employees. That is the only limitation upon the Board.

There is something wrong, that that man who builds up a business that way and at some point in it loses his right to say who is going to work with him.

To illustrate that, when we got into the question of who we could hire and who we could fire, just let me read two questions of the Board. You remember that I told Your Honors this morning that the production manager testified that when they reduced the force, efficiency was one of the things that they considered as to who they would let go and who they would not. Here is the Board:

> What is the best evidence of efficiency that could be brought in here? I don't mean the judgment of the foreman now, but what is the best factual evidence that the company has of the efficiency of the various individuals in its plant here? What have you brought in here in the way of evidence that we could see, so we who look at it objectively without being in the business, from which we could judge?

Well, no one could answer that question, so he continues:

> What do you have in your files out there that would indicate to you or the members of this Board what is the efficiency of the individuals who work out there?

Well, they said they didn't have any records; they had to do some things on individual judgment. But immediately the Board was going into that question and they were going to determine the efficiency or lack of efficiency. They were creating a statute substantially equivalent to the civil service, no getting around that.

Now, at the risk of burdening Your Honors just a moment more, I will refer to this *Texas & New Orleans case*. Most everybody has referred to it. I don't know that I could add any light to it, but again, the case should be considered in the light of the facts which were before the Court. And I cannot get away from the circumstance that the railway had voluntarily gone before the Railway Board, had been going through proceedings there for more than a year before the acts complained of happened. So that, as this Court well said, it did not involve the question of hire or fire of employees. It did involve a question of submitting to the jurisdiction of the Board and then trying

to obstruct the normal procedure of that Board. Here is what the brotherhood brief itself said on the question:

> The Railway Labor Act, in the first place, does not make it a crime for the employer to hire whom he pleases or discharge whom he pleases. The act does not attempt to limit his power of hiring or discharging. The act provides only that those who are his employees shall have the right to designate their own representatives to negotiate with him concerning terms and conditions of employment, and to be free from any effort on the part of the employer to perpetrate a fraud upon the employees in such negotiations.
>
> It must be apparent—

Continuing to read from the brotherhood's brief—

> It must be apparent that there is not in issue in the present case the basis of the decision in the *Adair case;* that is, the right of the employer to hire whom he pleases; nor is there in issue in the present case the basis of the *Coppage case;* that is, the right of the employer to discharge whom he pleases.

That was the brotherhood's position in the case, that those things were not involved. I take it it is this sort of situation: If there had been no proceedings before the Labor Board, and if, with everything going along in normal way, the railway had undertaken to discharge some men, and assuming they had discharged them solely because they were union men—there was no controversy—that would have presented quite a different question, and when they say that the reinstating of these men was not based upon the discharge having been in contempt of court, every assignment of error in that record is that the Court erred in requiring, as a purging from contempt, to do this. There is no use of trying to get away from what was brought before this Court. It was that particular question.

I thank you.

Mr. REED. Nothing further, Your Honor.

(Whereupon, at 2:45 p. m., the oral arguments were concluded.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 422

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC., RESPONDENT

No. 423

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC., RESPONDENT

ORAL ARGUMENT

WASHINGTON, D. C.,
Thursday, February 11, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 2:45 p. m.

Appearances:

On behalf of the petitioner: Hon. Stanley Reed, Solicitor General of the United States, and Mr. Charles Fahy, General Counsel, National Labor Relations Board.

On behalf of the respondent: Mr. Leonard Weinberg and Mr. Harry J. Green.

The CHIEF JUSTICE. Nos. 422 and 423, National Labor Relations Board against Friedman-Harry Marks Clothing Co., Inc.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. FAHY. If the Court please, I shall make a brief statement of the facts of the case and shall not attempt to go over the ground of the constitutional questions which have already been discussed.

This case arose under the statutory procedure on a charge filed by a number of the employees of the respondent that they had been discharged because of their efforts to form a local unit of the Amalgamated Clothing Workers of America. The charges were filed by 26 employees.

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A hearing was held after the issuance of a complaint, and under stipulation between counsel for the Board and counsel for the respondent a great deal of testimony was introduced in the form of written statements, without contradiction, cross-examination having been expressly waived because, as it appeared, respondent was anxious that the record be made, that his questions raised on constitutional grounds be preserved, and the matter come on before the Board and the courts in that manner.

Respondent introduced no testimony in opposition to that of the Board with respect to the reasons for the discharges, and I think it may be said without any dispute that respondent here does not contest the merits of the case.

The Board, however, found that only 19 of the 26 employees who had filed charges were in fact discharged in the commission of an unfair labor practice under the act, and issued its cease and desist order against the continuation of such interference, requiring the restoration of the men to employment, or offer of reinstatement, and that they be made whole; also that a notice be published that the company had complied with these provisions of the order, the notice to be posted for a period of 30 days.

The respondent's business is, briefly, this: It is a clothing manufacturer located in Richmond, Va. It draws 99 percent of its materials from States other than Virginia as a regular, continuous course of business. It sells and ships as a regular course of business 82 percent of its products directly in interstate commerce. Most of its material comes originally from New England. It goes in substantial quantities then—and this is typical of all of this industry—to New York or New Jersey, where it is sponged, and then it goes to the manufacturing plant in Virginia, where it is made into garments.

The union involved is a large, well-known national organization having collective bargaining arrangements for the settlement of disputes with employers in the predominant part of this industry.

I should say that one of the employees was discharged for having filed a charge with the Board.

Without going into the arguments again as to the position of the Government on the application of this act to such an enterprise, but only as a factual matter, I will simply add that it is apparent from the nature of this business, which I have briefly described and which is elaborated upon in the record and in the brief, that the respondent as a regular course of his business is utterly and completely dependent upon interstate commerce; and it would seem that if a strike occurred at Richmond in the plant there, where, as I have said, 99 percent of the goods come from other States and 82 percent of the products leave there for the other States, there would be a complete cessation of his interstate commerce.

A strike ordinarily closes an entire plant. Orders could not be filled. Orders could not be given to carry on a business so closed down. Strike clauses, as a matter of fact, are inserted in many contracts for supplying products, in order to take care of just such a situation.

It is interesting to note in passing that the president of this respondent himself testified that, although there was no strike as a result of these unfair labor practices, there was a disturbance created by the conduct of the employer among the employees, and, although its total business is 150,000 units, as they are called, per annum, the direct result of this controversy itself, which did not even eventuate into a strike, was the cancelation of the order of one customer for 30,000 units, that customer not giving the order because of the fear that it could not be filled.

The respondent employs 800 employees. Therefore, although not as large an operation, of course, as the Jones & Laughlin Steel Corporation or the Fruehauf Co., it is a large manufacturer who has grown up in Virginia as the site of its manufacturing operations, with a national market, because of the control of the Federal Government over interstate commerce, so that it may, while located in Virginia, without any impediment, receive its raw material from outside the State, with a national market in which it sells without impediment 82 percent of its products.

Thank you.

ORAL ARGUMENT ON BEHALF OF RESPONDENT

Mr. WEINBERG. May it please Your Honors, I suppose much could yet be said about the philosophy and the economics and the legal theories that are comprehended in a consideration of this act, but, at least at this hour, after all of these cases have been heard, I do not desire to be charged with burdening or obstructing the free flow of the consideration and decision of these particular cases, and therefore I am going to confine myself entirely to a discussion of the facts in the two cases involved here and the particular legal implications which we think arise from those facts.

Justice MCREYNOLDS. What is the difference in the cases? Are the two cases different?

Mr. WEINBERG. The two cases are identical, Your Honor, except that one case was brought in October and the other about 10 days later, one for about 10 or 11 employees, and the other for 9 or 10 other employees, the discharges having occurred in different periods along that time. Otherwise, the facts are identical, and therefore they were treated below and here as being one case.

A discussion such as I have indicated, I assume, would fall naturally into two parts. The first one is what this respondent is, what it does, and what the labor relations were between it and its employees which this Board under this act seeks to regulate and control. And then, as indicating the extremes to which the Board had to go in order to apply this act to us, I shall discuss briefly the administration of the act itself in our particular case and make a mere suggestion as to whether or not it is applicable to ours.

The respondent, the Friedman-Harry Marks Clothing Co., is engaged, as Mr. Fahy has said, in the business of manufacturing men's clothing, overcoats, and suits in the city of Richmond, Va., where it has only one factory and where it has its only factory and its offices.

It has been engaged in this business since 1931, succeeding a former corporation owned by practically the same stockholders. It operates only one factory, manufactures all of its product in that factory. Its plant and its offices are all located in that factory in Richmond, Va. It does, however, maintain a showroom and a sales office in the city of New York.

It employs in its factory approximately 800 persons—and may I stop to say, if Your Honors please, that this factory manufactures clothing mainly by machine. It is machine-made clothing. The materials that it uses, of course, are woolens and cottons and silks and silesia and thread and buttons that come from all parts of this country and, perhaps, in some instances, even from foreign countries.

These materials it purchases, has sponged in New York or in New Jersey, from there shipped to Richmond, Va., to its factory, where they are first designed, then cut, fabricated, and converted and fitted together, all of these materials, into overcoats and men's suits of clothes. The entire process of that manufacture takes place in this factory in Richmond, Va.

It then sells these products by salesmen to retailers in the United States, and it is true that only 17 percent of its product is sold in the State of Virginia, and the balance is sold and distributed throughout the United States to retailers. The business of this company comprehends perhaps less than 1 percent—not that size has anything to do with it, but so that you may what kind of a company it is—less than 1 percent of the clothing manufactured in the United States.

In short, if Your Honors please, this company, this respondent, is absolutely no different in any respect from the hundreds of thousands of manufacturers in the United States producing apparel and furniture and machinery and utensils and all the myriad of articles which all of us wear or use in our daily lives.

The unfair labor practices which are charged in this case consist in discharging—finally found by the Board—19 of these 800 employees, all of whom are engaged in the manufacture of clothing in this plant, all of whom are engaged in a conversion and fabrication which requires some 100 operations, or thereabouts, from the time the materials arrive in our plant until they leave as a finished product.

For instance, just to give you an illustration of what the individual complainants do, Robert Koch, one of them—some of them are men and some of them are women, by the way—Robert Koch was one of a group—because there are groups—one of a group pressing seams. That operation means, as I understand it, that when the front and the back of the trousers are fitted together and this seam is joined by these workers—the trousers go down what is almost an assembly line in most of these factories—a presser presses them with an iron or with a machine, presses that seam down the side of your trousers.

Luella Nichols, another one of the persons complaining, was what is known as a collar feller, and I understand that to mean that she is one of a group of girls when the collar is made and joined on the coat, cuts the threads which are left hanging out and cleans them off in that operation as it goes out.

And another girl, for instance, was Reba Holder, a button sewer, who, either by machine or by hand, depending on whether the particular clothes were being made with machine buttonholes or machine buttons, sewed the buttons on the coat or the trousers or the vest, as they came to her.

And it is interesting in passing, because it does have some effect—at least I would like to comment upon it later on in my discussion with Your Honors—it is interesting to note that in these factories these operators who work in groups at various operations very often are switched from one operation to another so that, while they may be doing buttonholing one day, they may be doing collar felling or seaming the next day.

So, that it is apparent that these workers and us, the employer, like others engaged in the manufacturing, and even in the wholesale and retail business, are doing the normal thing that the Court and all of us know occurs in a factory of this kind. I only pause for a second, because I shall make no attempt to discuss the law at this time of the day and on the fourth day of this series of cases—to suggest one thought that does occur to me, however, and I respectfully submit to Your Honors that a reading of the act bears me out, that if the Government's theory of the current and stream of commerce—and when they come to make the findings in this case they find that we are in the current or stream of commerce, as I shall point out, because we get raw materials from the outside and we send the products out from our factory after they have been fabricated to States beyond our border—that if it is on that theory—and it is to a very large extent, because you will find in the Board's decision that they support their findings on that theory—that this act is applicable to us, then I respectfully submit to Your Honors that the same considerations apply not only to every wholesaler, but with more force, it seems to me—and I shall indicate the reason—to retailers. And I suppose it is not inappropriate or a breach of decorum to say that it would apply to such concerns as Sears Roebuck, as Montgomery Ward, as Marshall Field, or to retailers like Wanamaker's or Gimbel's, Macy's; and for this reason, Your Honors, that if in our case, where we take utterly unrelated raw materials and convert and fabricate them, taking them out of the stream when they get to our factory, changing their character and transforming them into a suit of clothes, and they can be said to be in the stream or current of commerce, because those clothes, forsooth, go out to purchasers beyond the State of Virginia—then how much more so can it be said of a concern which wholesales products which come into it from all over the United States, indeed from foreign countries, as Your Honors know as a matter of common knowledge, which do not transform those articles, and in many cases sell those articles even in their original packages, and indeed further, in many instances never even take the merchandise into their own plants, in the case of concerns like Montgomery Ward and Sears Roebuck and other large wholesalers and jobbers. Certainly, in those instances, the merchandise, I respectfully submit, has never been removed from the stream of commerce.

But isn't it equally true that the act then applies to every retailer, if Your Honors please, at least every retailer who does any fair-sized business because, as Your Honors well know, stores like Wanamaker and Macy's, and indeed Woodward & Lothrop here in the District, and many others, get their merchandise in completed form, not only from every State in the Union but from foreign countries. They maintain foreign buying offices, everyone of us knows that. They get that merchandise in and sell it not only to people who live in the same community, but they ship it by parcel post, by freight, by railroad, to purchasers without the State. Wanamaker's, Macy's—they sell thousands and thousands and thousands of dollars worth of merchandise to people in New Jersey, in Pennsylvania, in Maryland, in Washington, and in the original package in which it comes into their places of business.

So that, if this argument of my friends with respect to the stream of commerce is applicable to a manufacturer who takes raw materials and converts them, it is equally applicable to everyone engaged in almost every business, down to the man that runs a little hot-dog stand out on the road and takes a roll and cuts it open and puts a frankfurter inside of it and spreads mustard on it and sells it to somebody who is in an automobile, a bus, going from one State into another, to make a homely illustration.

Now, if Your Honors please, I think the absurdity of the thing demonstrates its impracticability, without any further laboring with the law on the subject.

If Your Honors please, what were the unfair labor practices charged against us in this case, and how did they originate? Very briefly, they were these: Early in the summer of 1935 the Amalgamated Clothing Workers of America sent organizers down to Richmond to our factory for the purpose of organizing—and there had never been one there—a local union of the Amalgamated Clothing Workers of America, and they succeeded sometime during the summer of 1935 in recruiting a small number of members for their union in our factory. It was only our factory to which their attention was directed.

Charges arose against us when, during the slack season of 1935—which is with all these factories about the end of August and the early part of September—during that slack season, in accordance with the usual practice which occurred every year, this company laid off some of its employees, and among the employees laid off were perhaps 29 or 30, or less than that, who in the meantime had joined the union in the past 4 or 5 months, during which time they had been apparently trying to organize our plant.

And I make no defense here, and I shall explain to Your Honors, no defense of the activities of these employers or what they did. God knows, the practice of some employers, and not only manufacturers of clothing, but employers of household labor and farm labor and every other kind of labor, indulge in practices which no one could justify, either ethically or morally, and I do not consider in this case—and that is why we took the attitude we did in the presentation of this case—that the question here was whether or not we could justify the actions of the company that we represent or not. That was not the question that we conceived to be raised in the early part of last September, a month and a half after this act had been passed. We were one of the first two or three companies proceeded against, and that explains, if Your Honors please, the reason why we offered no evidence in this case and made no effort to clutter up the record with a lot of futile, in my opinion, excuses as to why these people had been discharged.

Now, these lay-offs which occurred in September during this slack season are the basis of the two cases which are tried here together, and they are undefended. The record is an ex-parte record as far as the acts themselves are concerned.

The union thereupon filed charges with the Labor Board, and the Labor Board immediately filed a complaint against us alleging that we had violated subsections 1, 3, and 4 of section 8 of the act, which Your Honors will recall by this time now relate to unfair labor practices, in that they are interference with the right of workers to join unions for the purpose of collective bargaining and representation; and that in one instance we had discriminated, although we had laid

the woman off, the record shows that the woman had been long before laid off, when she did file the charges with the union; and they thereupon laid another charge against us of having discharged her because we refused to take her back.

The Board also charged in its complaint that these acts—and charged it in the words that "these acts" of ours had "burdened and obstructed the free flow of commerce."

At no time, if Your Honors please, before or since, has there ever been any disorder, any industrial strife, any strike, any stoppage in production, any stoppage in the shipment of our merchandise, and absolutely no effect upon the production or the sale of our merchandise, throughout the whole time comprehended by this organization work and these discharges and down to today.

This thing did not even obstruct the flow of merchandise through our own factory, much less the flow of merchandise into interstate commerce, and I correct my friend Mr. Fahy when he says that the president of this concern testified. He did not testify at all. You know yourself we put no evidence on. We simply gave you in written form all the evidence that you demanded of us, much of it irrelevant and immaterial, but there was no testimony. What happened was that one of your lawyers, who also turned out to be the prosecutor, had brought down to Richmond, sometime in the early part of this matter, in the course of his investigation, to see our officials, and he testified on the record that the president told him that the matter was interfering with their production of goods and they were not selling as much goods as they had formerly.

But the record shows—the record shows—by even your own testimony, that we produced and sold in November 1935, 50 percent more goods than we did in 1934, and that was the time that the testimony was taken, in November of 1935. So that the testimony of your attorney as to what the president told him, after all, is belied, which you yourself have heard.

And I might say that it is not surprising if their business fell off, if Your Honors please. It is not surprising, because the fact is—and they followed the procedure with respect to us that they follow with respect to everybody—that immediately that this charge had been laid upon us this National Labor Relations Board, which maintains its own publicity department, had mimeographed and itself turned over to the press of the country the statement that we were violating this act, that we were unfair to our employees, and that they had laid charges against us and were prosecuting us. So there is no wonder that some of our customers wondered whether or not we would be able to deliver merchandise.

Now, if Your Honors please, we come to the administration of the act with respect to us, and I feel that it is incumbent to discuss that for a few minutes, because that demonstrates how this Board attempted to make the act applicable to the Friedman-Harry Marks Clothing Co.

It shows also—I am not going to argue it—that this act is inseparable, that your claim in our case is that by discharging these people we are interfering with their right to collectively bargain, compulsory, unilateral collective bargaining it is, if Your Honor please, and we think that when you see by the administration of the act, how it is applied to us you will conclude that it is arbitrary and unreasonable and not a reasonable regulation under the commerce clause.

Now I have already suggested to Your Honors in passing that this was one of the first cases, and that after the passage of the act, because of the unprecedented demands which were immediately made upon us, we decided not to defend this case at all, except to reserve our constitutional rights—and this is important in a moment, I submit, and I ask Your Honors' attention to it, and attention is called to it for only this reason, that we stated to the Board immediately, in November that we, in order to expedite the hearing of this case—this was November of 1935, on the 5th of November the hearing was, and just prior to that we were met with a demand by this Board under one of the terms of this act—I shall not stop to find the section right now—with the demand from this Board that we disclose to the Board and give the Board access to every bit of confidential information with respect to the carrying on of our business that you can imagine; and when that occurred, and not being able to see its relevancy to this matter, we determined that there was no use in trying to defend this case at all, and we immediately asked the Board to grant us a quick hearing, told them we would not defend the case, asked for an adverse decision so that we could take the matter to the United States Circuit Court of Appeals for a review of the case. Now this is what happened under the administration of this act and in the light of what we had ourselves done.

How did this Board proceed? Following its usual procedure, it gave this thing publicity by handing out its own printed statements, and then it sent investigators to our factory, and it made these demands, if Your Honor please—and this all appears in the record—and we complied with them under objection, reserving our rights, but we complied with them. It demanded a disclosure, first of all, of the company's private records of accounts, including the amount of capital invested by the private owners and who they were, the names of all of our employees, the names and amounts of all of our pay rolls, the amounts and the character of our purchases of all material and from whom made, the number and the kinds of units that we were manufacturing, the number of employees in our plant, not at that time, but from 1928 up to and including 1935, the names and the addresses of all our salesmen, the names and addresses of our owners, with the amount of stock ownership that they had, and their previous occupations, and whether or not they owned stock in other corporations, in other enterprises—done under the terms of this act.

Now, what possible relevancy, if Your Honors please, even recognizing that the act contains a provision that there shall be no legal rules of evidence adhered to in the hearings of these cases——

Justice STONE. Did you contest any of those demands?

Mr. WEINBERG. Yes, sir; every one of them. I reserved our rights to every one of them. We did have under the act one alternative that we could have done, and we were threatened, the Board threatened me personally, that if we did refuse to turn over this information they would take us before the United States District Court under the provisions of the act and force us to not only comply but to suffer such punishment as under that act that court had a right to make.

Therefore we have given them this information. We gave it to them reserving our rights in each instance.

Now, what possible relevancy, if Your Honors please——

Justice STONE. What rights have you except not to give the information demanded?

Mr. WEINBERG. Well, the rights only to comment and—I think that is wrong——

Justice STONE. Do you think that will help us any in deciding this case?

Mr. WEINBERG. I don't think it would have helped any, if Your Honors please, in the ultimate decision of this case, if we had stopped and had ourselves sent to jail in Richmond.

Justice STONE. I mean will your comment on that now help us?

Mr. WEINBERG. Perhaps not, except, as I suggested to Your Honor, and I won't persist in it if Your Honor feels that it is not proper at this time, except to show Your Honor that the administration, that the abuses and the invasions of fundamental rights which inevitably flow, I submit to Your Honor, from this act, in every one of its provisions—that is the only purpose.

Justice STONE. If they are invasions and you resist them——

Mr. WEINBERG. Yes, Your Honor. I beg Your Honor's pardon?

Justice STONE. I say they do not flow from it if they are invasions and you resist them. But if you do not resist them, I do not see what we can do about it.

Mr. WEINBERG. We think that there were enough things that we did not permit them to do in this situation, if Your Honor please, that will let you do something about it.

Justice STONE. Those are what I want to hear about.

Mr. WEINBERG. I beg your pardon?

Justice STONE. Those are what I would like to hear about.

Mr. WEINBERG. Following this procedure, if Your Honor please, the Board then appointed an engineer as the trial examiner to hear and determine these questions, the question of the constitutionality of this act and the applicability of it to us, and over our objection again this engineer the Board admitted into evidence and based its decision upon—and we have noted our exceptions to that—the most amazing mass of testimony that can be conceived within 400 printed pages. I shall not labor the argument by detailing that testimony. Some of it has been referred to in other cases, some of the same kind of testimony, but it contained opinions of statisticians, of economists, of officers of unions, of competing manufacturers having union affiliations, of labor managers, and others, with respect to—not a thing with respect to what went on in our plant, not a thing with respect to how we conducted our business, not a thing with respect to how we produced or shipped our merchandise—and we have reserved our exceptions to every bit of this in the record—but with respect to the manufacture and distribution of men's clothing generally, opinions, as to the validity of this act, as to the value of collective bargaining, testimony by Mr. Hillman, the president of the union, and letters from President Roosevelt congratulating him upon what he had done for industry and what he was doing for the National Industrial Recovery Association, references by him and others to the fact that even a justice—and they made great point of it—that one of the Justices of this Court had sat as an arbitrator in a labor dispute in some other industry, and discussions by great economists as to the evils flowing from the inequality of wages and

working hours in all kinds of industries not related to us and not related particularly even to this industry.

We might have made in response to that a compilation of all the speeches that the members of the Board and their lawyers have been making in the public press showing the bias that they have on their side. However, none of this referred to us.

But an examination of the decision in the case, covering some 10 or 15 pages, pages 379–409 of the record—40 pages, I think, of the record—shows that it was directly upon these considerations, if Your Honors please, that this Board decided that we were engaged in interstate commerce and that the labor practices in question had obstructed and interfered with and directly affected interstate commerce; and upon these findings of fact and conclusions of law the Board, after waiting 4 months in this ex parte case, on the 28th of March passed an order requiring the reinstatement of these employees with back pay from the dates of their discharge, and the posting of notices for 30 days saying that we would not do it again.

And, of course, I shall not stop to argue that we think that that decision that we cannot discharge is tantamount to depriving the employer, under the construction of this act, as placed upon it by this Board in this and other cases, of all control in its management of its labor relations and of its internal business, in the promotion and the disciplining and the demoting of its employees, and substitutes the management of this National Labor Relations Board for the management of this company.

It seems to me, if Your Honors please, that it would be now a work of supererogation to discuss at this hour the law respecting the power of Congress under the commerce clause, when it has been settled for at least 85 years by the decisions of this Court from *Gibbons* v. *Ogden* (9 Wheat. 1) and *Kidd* v. *Pearson* (128 U. S. 1), down to the *Carter case* in the last few months.

Nor will I argue the arbitrary and unreasonable character of the order of reinstatement, although I do say that it attacks the very fundamentals, if Your Honors please, of the relationship between employer and employee, and while it does not require, and cannot require, the employee to return to work, it requires the employer unwillingly to put the man back to work, and while the order does not say how long, certainly, I respectfully submit to Your Honors, it would be an empty gesture—an empty gesture—if it meant that all we had to do was to take him back that day and then find an excuse to discharge him the next day.

I do not know whether we are married to the employees by a shotgun ceremony with the Board standing over us with a shotgun forever, or for how long, but for the first time, it seems to me, in the history of the English and the American law, specific performance is now set up for personal service contracts at will.

And at whose will? It must necessarily now be, after such a decision, at the will of the Board, not the will of the employer and the employees, the parties to the contract.

And then with respect to back pay—and I only refer to this in passing—the order required us to pay these employees back pay up to at that time the 28th of March. It is still continuing. It is 18 months now, Your Honors, in a case that we asked this Board to expedite and offered not to contest, 18 months now and the order was

made, if Your Honors please, although the record was a six or seven hundred page record, without this Board attempting to find out from these employees, whom it put on the stand, in any instance whether they were then employed, whether they had made anything since the date of their discharge by us, whether they wanted to go back to work for us, or even whether they could be found, whether they were still living anywhere in the neighborhood of our factory.

And how did they estimate the back pay? Because our employees in this instance, different from most of these other cases, these employees were paid on a piece-work basis. Now how could this Board determine how much we were to pay them? They entered into this kind of an arrangement: They said "You shall reinstate them with back pay based on the average of the earnings of the other employees in the same operation during the period of their unemployment."

Now that is open to so many criticisms, it is so absurd, that the mere statement of it does not require, I respectfully submit, any further argument.

The posting of the notice requirement I comment upon only as being not only unreasonable in law, capricious, and arbitrary, but vindictive. Having been brought into compliance with the act by the decision of this Board and by its order that we must cease and desist, why humiliate us and make us make a public apology to our employees and post a notice for 30 days that we will be good and accept an invitation to further complaint?

Then, if Your Honors please, I suggest to Your Honors it is worth noting that, after waiting until the 28th of March, this Board, without any notice to us at all, although it had been the recipient of numerous requests from us for a decision, suddenly decided these cases and simultaneously issued another press release to the effect that they had found us guilty, and the same day sent the cases—where? To the United States Circuit Court of Appeals in New York, to the second circuit, for a hearing.

And why? All of the previous notices to us, the charge, the complaint, the decision, the taking of the testimony, all had occurred down in Richmond, which is in the fourth circuit. The plant is located there. The company is located there. Every one of the employees lived there. The situs of everything was in Richmond, Va. But on the 28th of March, on the mere technicality that the act provides that the Board can bring its petition for enforcement in any circuit where the respondent may be said to be doing business, and because we maintained a showroom and sales office in New York, they dragged us up into New York.

So that the justice of the United States circuit court of appeals had to ask them: Was it because they hoped to get a more favorable forum, or what kind of a trick, as they put it, was it that made them bring us up there, when the Fourth Circuit Court of Appeals was meeting right in Richmond at the time and its dockets were ready?

And I make that comment for this reason, if Your Honors please, that we tried to get a hearing before that circuit, and this Board ousted our hearing by holding back, because this act—and I say again it is an arbitrary and an unreasonable and a capricious act—this act provides that we cannot take an appeal until we can get that Board to certify the record for us to the circuit court of appeals. So they refused to certify the record for us but took it to New York themselves and ousted

the Circuit Court of Appeals for the Fourth District, and dragged us up there to harass and embarrass us, merely because we maintained a salesroom and a showroom up there. And the court held, apparently reluctantly—I submit the court up there held reluctantly—that it had to hear the case because we were domesticated, within the meaning of the law, within the State of New York.

I say, if Your Honors please, that these facts as I have outlined them briefly to Your Honors, demonstrate the abuses and the invasions of every fundamental right that a man has that inevitably flow from this obnoxious act and must always flow from legislation such as this.

From all of this we submit respectfully, if Your Honors please—and I apologize that I have been a little heated, or if I have wandered off the point once or twice—we submit that the ex-parte facts in this case show conclusively that this respondent is not engaged in interstate commerce within the meaning of that phrase and that the unfair labor practices alleged in this case cannot be said in law to directly affect interstate commerce.

I am very grateful to Your Honors for the privilege of discussing these facts with you, and I thank you for your patience, and I bespeak just a few minutes on behalf of my associate, Mr. Green, who has just a word or two that he would like to say in this case.

Thank you.

FURTHER ORAL ARGUMENT ON BEHALF OF RESPONDENT

Mr. GREEN. If it please the Court, at this late moment in the argument of this series of cases we do believe that the real patient in this operation of national compulsory collective bargaining should be given some consideration. That patient, if Your Honor please, is neither the employer nor the employee. It is the government of the various States of this country, from whom it is sought to carve an integral and important function of Government.

Now, if Your Honor please, the relation of the State in this instance is of real significance, because it is a well-established rule that once the valid jurisdiction of the Congress of the United States under the commerce clause attaches, the right of legislation on the part of State governments which may in any way be inconsistent ceases.

Now, the significance of that must at once become apparent. If this act is valid, particularly as applied against a manufacturing concern local in its nature, and if the Federal Government has the right to regulate the relations and the individuals in the course of what must be admittedly a local business, then the right of the State to legislate on that subject in a form in anywise different is gone.

Now the proposition, inconceivable in fact as it may seem, must flow from the finding of the validity of this act as attempted to be applied, because it appears at once if any dispute is presented to the National Labor Relations Board—and let us take the example of the collective bargaining attempt of a union with an employer, and if the union makes a demand on the employer for whatever it may be, he cannot shield behind the fact that the State government has rules and regulations, and he is complying with them; but the Labor Board must decide whether or not it has attempted to collectively bargain the point.

For instance, a State statute requiring a lunch hour of 1 hour in duration as a health measure—without attempting to pass on its validity at this moment—and the union makes a demand for a half an hour lunch hour so that they can get home a half an hour earlier in the evening; and the employer says: "No; I am not going to bargain with you on that point. The State statute which governs me says that I must give an hour for lunch." And the matter is brought before the Labor Board.

The Labor Board will naturally have to find the employer guilty, because he has refused to collectively bargain, despite the fact that the State has legislated.

So much for the implications of that, but these very powers sought to be exercised by the Federal Government have been powers denied by this Court to the State governments, and I need only refer Your Honors to the two *Wolff cases* (*Wolff Packing Co.* v. *Court of Industrial Relations* (262 U. S. 522); *Wolff Packing Co.* v. *Court of Industrial Relations* (267 U. S. 552)). In both of those cases the attempt was very much the same. The attempt was to require the employer to arbitrate his labor disputes. The attempt was made there, too, to require the employer to take back into his employ any persons that he had discharged as a result of a labor dispute. So that the Federal Government is claiming over a local enterprise powers which the local government itself does not have.

Now, then, in order to evade—evade—the implications there and the rulings, direct as they are, in the *Carter* and the *Schechter cases*, the Government contends now that this is not a regulation of wages and hours and conditions of employment; that the *Carter* and *Schechter cases* only related to them.

On both of those propositions the Government, in the face of the decisions, must be in error; and there is no difference between requiring the employer and employee to bargain to a conclusion, as this Board has held, about wages and hours and conditions of employment, and a direct regulation. It is the attempt here to accomplish by indirection what has been forbidden when attempted by direct action.

Now then, if Your Honors please, the only one of the three propositions raised by the Government as supporting their case which is at all germane in this instance is the third one. The first, you know, is the intent—that is, businesses and labor disputes done with the intent of affecting commerce; and the second, one of those that necessarily affects commerce. The only one at all open in this case is the third proposition, that the Government has the right to regulate where the labor dispute may tend to lead or lead to industrial strife which may affect commerce.

If Your Honors please, the indirection of that is so apparent that it need go hardly without argument, that in order to reach a connection between the labor dispute at the one end and interstate commerce at the other, a process of reasoning from one step to another step, and to a third step, and so on, must be followed until there is no question that the repercussion felt at the end of interstate commerce, if felt at all, is remote and distant, and when applied, as it must be applied, to a particular business and to a particular industry and to a particular case, as in this one, there is no repercussion of any kind or character.

Now, if Your Honors please, so far as the proposition of law in this

case is concerned, we cannot sum it up any better or any more applicably than the language of this Court in the *Carter case* in commenting upon its decision in the *Schechter case:*

> And we now declare that the want of power on the part of the Federal Government is the same whether the wages, hours of service, or working conditions, and the bargaining about them, are related to production before interstate commerce has begun or the sale and distribution after it has ended.

ORAL ARGUMENT ON BEHALF OF PETITIONER

Mr. WYZANSKI. May it please the Court, with due deference to the counsel who spoke first for the respondent, I wish to say that there is nothing in the record, and I am assured by Mr. Fahy, my associate, there is nothing in the facts, to support the statement that the Board coerced in any way the respondent in this case into giving testimony.

There is a stipulation at page 71 of the record which shows that the only ground upon which the respondent asked to question any of the evidence presented was on the ground of competency, relevancy, or materiality.

I turn now to what I began the argument with, the discussion whether or not this act may be so applied as to cover all industry and labor throughout the country, and I wish in particular to develop the lines of possible distinction which were implicit in my opening argument but which I did not fully elaborate then.

Of course, the Government contends that the act may be applied to all the parties here at bar, but if we are mistaken we wish to suggest possible lines of distinction between the different cases.

The first two cases, those involving the Associated Press and the Washington, Virginia & Maryland Coach Co., were cases in which the parties' principal activity was interstate commerce and the employees involved were either in or about commerce. We feel clear that they are within the line of congressional power, and I shall not pause to discuss the facts in those cases to any greater extent, but I turn to consider a comparison between the three manufacturing cases which are at bar, in order that, if Your Honors disagree with our position that all of them are within the scope of the act, you may have a possible line for distinguishing between the cases.

Your Honors will recall that this statute is a preventive statute designed to prevent those labor disputes which burden or obstruct commerce. There has been some talk at bar of the failure of Congress to include the word "directly" in the statute. Of course, Your Honors know that in the Sherman Act the word "directly" is not included. In fact, with the exception of the ill-fated Bituminous Coal Conservation Act, I know of no act of Congress relating to commerce which uses the word "directly" in its jurisdictional ambit. The word "directly" is necessarily implied by the decisions of this Court in interpreting all the statutes, and its omission here is, in our opinion, of no significance, provided that the act is applied only to those disputes, or the causes of those disputes, which directly affect commerce.

Now, there are several preliminary matters that I wish to state are not involved in this final discussion of the cases. At the outset I pointed out that question whether freedom of organi ation and freedom of representation could be protected—whether that protection was reasonably related to commerce—was deciced by Congress, and that that decision by Congress is a decision which does not have to

be made again by the Board every time. The Board is entitled to assume that the practice will lead, or has the likelihood of leading, to a dispute.

Our position on that point is stated most clearly, I think, in the Jones & Laughlin brief at page 36 in the footnote to the first paragraph on that page. The issue before the Board is whether or not a dispute, if it occurs, will be likely to burden or obstruct commerce, not whether the practice is likely to lead to the dispute. That second issue is foreclosed under the terms of the statute, according to our reading of it.

There is a second point I want to make clear is not involved. It is true that sometimes indulging in this practice will not lead to a dispute. Sometimes matters will adjust themselves even if the discriminatory practice is continued; but a preventive statute, in order to be effective, must be addressed to those situations in which it is reasonably to be anticipated that a dispute within the power of Congress will occur. Until the practice has in fact spent its force nobody can tell what its consequences will be, but if there is a reasonable likelihood that the consequence will be a dispute that burdens commerce, then we say Congress has the power to prevent indulgence in that practice.

It is also true, of course, that an elimination of these discriminatory practices will have purely local consequences as well as national consequences. But the mere fact that a cause has a local consequence as well as a national consequence does not prevent it being within the power of Congress, for obviously any cause is bound to have many different effects. The only question is whether it has a national effect within the power of Congress.

Our position with respect to these manufacturing cases is perhaps stated most succinctly in the summary of our argument in Jones & Laughlin, where, from pages 10 to 18, we have tried to state as briefly as possible the various theories upon which we suggest it is possible to apply this statute to one, two, or three of the manufacturing cases at bar.

As I said, there is a distinct difference between the enterprises which are at bar. We have said that the power of Congress clearly includes the power to prevent a strike—rather, to punish a strike—called with the intent of affecting commerce; and we have suggested that at least in some of these cases there is a very grave danger that the continuance of this discriminatory sort of practice will cause a strike of that type.

Now, from pages 40 to 44 in the *Jones & Laughlin case* we discuss that in some detail, and I would like briefly to add a word about the particular facts there, because I think on the "intent" argument that is the strongest case.

Jones & Laughlin, Your Honors will remember, is an integrated enterprise operating in many States, with approximately 20 different outlets, getting its raw materials from many different States. Although the principal manufacturing is done near Pittsburgh, the enterprise is far-flung. If a dispute began in Jones & Laughlin, we know with reasonable certainty that it would be bound to involve intentional interference with interstate commerce, for the people that are at one particular focal point would undoubtedly choose to get as much support as they could from the persons working in other parts of the enterprise, including the persons working on the transportation and interstate activities of the company.

Moreover, we know, for the record shows, or rather Exhibit 44, which has been submitted to the Court and which is included by stipulation in the record—exhibit 44 shows, that the steel companies of this country have united on a common labor policy, and though I do not intend to discuss the merit of that policy, I merely advert to it for the point of showing that if a dispute occurred between the employees in this company and the company itself, it is reasonable to expect that the dispute will spread to other employees dealing with other employers in the steel industry united in a common front with respect to their labor policy.

We have said that the power of Congress relates not only to strikes with intent, but strikes where there is a necessary effect, of interrupting commerce. The scope of the "necessary effect" principle is by no means certain, and on this we have made a number of alternative suggestions. We have merely pointed out, as something which we feel certain, that intent is not necessary in order to show that a dispute is within the power of Congress, because, as Your Honors have said in *United States* v. *Patten* (226 U. S. 525), if the necessary effect of a practice is to obstruct commerce it is unnecessary to charge a specific intent.

Now, when does a labor dispute have a necessary effect upon commerce? We have suggested that one criterion may be, if the dispute involves a substantial amount of the commerce in a particular commodity.

The Fruehauf Trailer Co. presents a case very much in point. They are admittedly the largest of the companies in the trailer business. Their nearest competitor does only 37 percent as much as they do. If there is anything in the doctrine that we suggest, that the obstruction of a substantial amount of the commerce in a commodity works such a necessary effect upon commerce that Congress can control it, it would mean that the principle would apply to the Fruehauf Trailer Co.

It would also seem that it might apply to Jones & Laughlin, but I am not going to spell out all the possible implications. I am just covering in summary fashion the argument which has already been made.

Another suggestion which we made was that a necessary effect upon commerce might exist where there was a well-defined stream of commerce. Now we do not rest our whole case, even with respect to necessary effect, upon stream of commerce. Nor do we say that necessarily every enterprise which receives and ships in interstate commerce is in a well-defined stream of commerce. The exact scope of that doctrine may be broad or narrow. If it is broad, it would cover the case of the respondent at bar, for that company admittedly receives 90 percent of its raw materials from outside the State and ships 80 percent of its products outside the State in which it manufactures.

But it is not necessary to consider stream of commerce in any such broad way as we have urged. There is a narrower aspect of the doctrine which is open to this Court.

It may be that a well-defined stream of commerce exists only in those cases where a single enterprise controls the sources of supplies, does the processing, and controls the outlets, so that the processing is a "throat" with respect to that enterprise's flow of commerce. If such a concept be adopted it would clearly apply to the *Jones & Laughlin case*.

There is another situation in which a necessary effect on commerce might possibly be spelled out, and that is where the effect of a dispute would be to interrupt a substantial volume of goods, although not a substantial amount of the commerce in a commodity. If this is the doctrine, all the cases at bar would seem to be within it, for there is no case at bar in which the goods moving out of the enterprise amount to less than $1,750,000 a year, and in many cases they amount to much more than that. But I do not intend to describe in detail the facts with respect to all these things. I merely suggest possible lines of distinction.

There is also a possibility which was developed by the Solicitor General in his argument in Jones & Laughlin; that is, that where a practice recurs frequently, as labor disputes recur frequently, it may be that Congress has the power to legislate with respect to those practices if they bear a relation to commerce.

If that doctrine be accepted, it is admittedly the broadest of the doctrines with which I have dealt. We do not contend that it would apply to all the firms that have been mentioned by the respondent, that is, retail firms who receive some of their products in interstate commerce or send out some of their goods in interstate commerce. We say it would apply only to those enterprises a substantial part of whose own business is either the receipt of goods in interstate commerce or the shipment of goods in interstate commerce. We do not claim that anyone who receives or ships in interstate commerce would fall within the scope of the principle.

Now I have one more specific word to say, and that is, whether a determination in this case with respect to the right of self-organization, freedom of representation, and freedom of association, forecloses any question with respect to wages, hours, or substantive working conditions. Of course, as Your Honors are now well aware, the statute has nothing whatsoever itself to do with wages or hours, but the question may be raised, does the principle apply? It may or it may not, and we suggest that a distinction may be drawn, though we do not necessarily press it.

The distinction is put forward at pages 92 and 93 of the Jones & Laughlin brief, and this is the distinction which we suggest. It has been shown by the decisions in this Court that interference with freedom of association and freedom of representation bears a reasonable relation to commerce, because the protection of those rights avoids labor disputes. Now it may be that a fixing of minimum wages or of maximum hours would not in the same way avoid labor disputes, because the fixing of minimum wages and of maximum hours would not settle the field of controversy but leave a large area of conflict; whereas this settles a large area of conflict and sets up a procedure for the voluntary amicable adjustment of all disputes.

Before I conclude I want to say one very general word. I thought the argument of the respondent in the *Fruehauf case* was a rather interesting one, in which he pointed out that in the State of Michigan were almost all the automobile factories, and it was only necessary for the State of Michigan to determine the policy in order to have the commerce of the country protected. I am not going to refer in detail

138858—37——12

to facts which all of us know at the present day. I merely point out that it is well recognized that there is a national public interest in this subject, so great that no dispute of the character which he envisages could possibly be adjusted without the cooperation both of the parties themselves and of public authorities, and that in the past on many occasions the Federal authorities have found it necessary to intervene. I do not suggest that the Federal Government can build up its *de jure* power merely by a series of particular *de facto* interventions in disputes, but I do say that the problem itself is obviously of such national character, at least in some of its instances, as to justify the intervention of Congress, and I contend that where two colossal forces are standing astride the stream of commerce threatening to disrupt it, it cannot be that this Government is without power to provide for the orderly procedure by which the dispute may be adjusted without interruption to the stream of commerce.

(Whereupon, at 4:08 p. m., oral arguments were concluded.)

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