

pressing need for recapitalization renders the same considerations inapplicable here. It should be held that scaling-down of accumulations is justifiable only where it results in the benefits to the preferred shareholders discussed above. Too much consideration should not be given to the improbability that accruals will ever be paid,<sup>59</sup> or broad and unsubstantiated statements concerning benefits to the corporation as a whole.

It has also been suggested that recapitalization could be more effectively supervised by an administrative board.<sup>60</sup> Commissioner Douglas of the Securities and Exchange Commission recently announced that the Commission will ask for power to regulate, among other things, reorganization proceedings.<sup>61</sup> It might be a desirable substitute for state action to authorize the Securities Exchange Commission to supervise recapitalization to the extent that such supervision would be constitutional. In the absence of legislation providing for supervision by court or administrative board, the protection of accumulations, like other problems of minority security holders, must await either the creation of an association like the British Shareholders Protective Association,<sup>62</sup> or a changed business morality.

Commentators have pointed out the undesirability of non-cumulative preferred stock.<sup>63</sup> That this feeling is shared by the investing public is evidenced by the fact that such securities are not highly regarded on the market.<sup>64</sup> We have seen that in many instances the cumulative provision is not only of no practical value, but is misleading. Therefore, unless the accumulations are fully protected, the desirability of any type of preferred stock as an investment is doubtful.

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### INDUSTRIAL STRIKEBREAKING—THE BYRNES ACT

Articulate opinion of industrial strikebreaking has been almost unanimously hostile.<sup>2</sup> There is now little question of the desirability of government interference if a law can be drawn which is both constitutional and effective. In its broadest sense strikebreaking has taken three principal forms: (1) *Replacements*. The most nearly justifiable form. Employers insist that they are merely

<sup>59</sup> See *Windhurst v. Central Leather Co.*, 101 N.J. Eq. 543, 138 Atl. 772 (1927).

<sup>60</sup> See 46 Yale L. J. 985, 1003 (1937).

<sup>61</sup> Chicago Tribune, April 18, 1937, pt. 2, p. 7, col. 6.

<sup>62</sup> See Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305, 1330 (1934).

<sup>63</sup> See Lattin, *Is Non-Cumulative Preferred Stock in Fact Preferred*, 25 Ill. L. Rev. 148, 164 (1930); 74 U. of Pa. L. Rev. 605, 608 (1926). But see Berle, *Non-Cumulative Preferred Stock*, 23 Col. L. Rev. 358 (1923).

<sup>64</sup> Professor Berle has called non-cumulative stock the "waif of the stock exchanges." Berle, *op. cit. supra* note 63, at 358.

<sup>2</sup> See, generally, 85 U. of Pa. L. Rev. 406 (1937); Levinson, *I Break Strikes* (1935), 11 Fortune 56 (Jan. 1935), 90 New Republic 227 (Mar. 31, 1937). But see Pinkerton, *Strikers, Communists, Tramps, and Detectives* (1878).

hiring new workers in the places of those who quit. The "finks" or new employees, however, are provided by the strikebreaking organization merely for the duration of the strike and, in the main, have neither the intention nor the ability to stay permanently.<sup>2</sup> Furthermore, they are nearly always accompanied by the less peaceable "guards."<sup>3</sup> (2) *Armed guards* or *shock troops*. The most spectacular form. Ranging from a few door guards to protect the "finks" to highly-militarized armies with complete arsenals, sometimes nearly equalling the number of workers,<sup>4</sup> the guards are prepared for violence, and are never disappointed. Extraordinarily expensive to the employer,<sup>5</sup> they easily pay for themselves, apparently, in demolished morale of the labor organization and in retention or even lowering of the previous wage scale.<sup>6</sup> It is important to recognize that their violence is not restricted to the employer's premises. They are employed, really, not to protect the property but to destroy the union, and this is not accomplished by gently removing trespassers. Recruitment is largely among criminals and bums in a few big cities.<sup>7</sup> (3) *Industrial spies*. Less spectacular and violent than armed guards but far more dangerous to organized labor. These spies join and even frequently control the unions. They precipitate untimely strikes or demonstrations and keep the employers fully informed on union activity.<sup>8</sup> In this way employers are able not only to upset specific plans but also to cripple the union by discharging the leaders, and many powerful unions have been destroyed because the members were not willing to attend meetings obviously open to the employer's men.<sup>9</sup> The current investigation by the LaFollette "Civil Liberties" Subcommittee of the Senate Committee on Education and Labor indicates that hardly a large industry is free from spies.<sup>10</sup>

To attack these varied problems by law is exceedingly difficult, and with the

<sup>2</sup> In a New York strike, an employer's spokesman stated that out of 20,000 strikebreakers hired as replacements, only 15% would make desirable employees. See 11 *Fortune* 56, 89, 92 (Jan. 1935).

<sup>3</sup> 88 *New Republic* 242 (Oct. 7, 1936).

<sup>4</sup> 90 *New Republic* 227, 229 (March 31, 1937). The National Metal Trades Association guarantees to its members, strikebreakers, up to 70% of their employees.

<sup>5</sup> An investigator for the labor board placed industry's annual bill for breaking up union organization at eighty million dollars. See 143 *Nation* 209 (Aug. 22, 1936).

<sup>6</sup> Basso, *Strike-Buster: Man among Men*, 81 *New Republic* 124 (Dec. 12, 1934); 11 *Fortune* 56, 89 (Jan. 1935).

<sup>7</sup> 143 *Nation* 381 (Oct. 3, 1936). See also 11 *Fortune* 56, 89 (Jan. 1935).

<sup>8</sup> Mr. Heber Blankenhorn, industrial economist of the National Labor Relations Board, quoted an estimate that three detective agencies have recently employed 135,000 industrial spies, and their income has amounted to \$60,000,000 a year. 123 *Literary Digest* 5 (March 27, 1937); 90 *New Republic* 227 (March 31, 1937); 144 *Nation* 238 (Feb. 27, 1937). See also *In the Matter of Brown Shoe Co., Inc., a Corporation, and Boot and Shoe Workers Union, Local No. 655*, case no. c-20, 1 *Decisions and Orders of the National Labor Relations Board* 803 (1936).

<sup>9</sup> 90 *New Republic* 227 (March 31, 1937).

<sup>10</sup> 123 *Literary Digest* 5, 6 (March 27, 1937).

possible exception of the Wagner National Labor Relations Act<sup>11</sup> nearly all attempts have been fruitless. Nine states prohibit the importation of armed guards,<sup>12</sup> but these statutes are not only not enforced, but they cannot prevent the separate importation of arms and guards,<sup>13</sup> and they do not touch the problem of spies and finks. Nor is the latter problem attacked by the few statutes imposing residence and other requirements upon persons seeking to be deputized as sheriffs.<sup>14</sup> Non-deputies have more difficulty in obtaining firearm licenses, but the difficulty is not insurmountable. Moreover, license statutes are not well enforced, and non-explosive weapons such as baseball bats and steam have proved effective.<sup>15</sup> An idealistic effort to attack finks and spies as well as guards has been made in fourteen state statutes which compel employers and agencies to make full disclosure to prospective strikebreakers;<sup>16</sup> apparently a surprising amount of strikebreaking is accomplished by men who only gradually become aware of their function.<sup>17</sup> But all these statutes are obviously fragmentary, and they have not solved the problem. In Wisconsin an industrial spy- and agency-licensing statute,<sup>18</sup> requiring the filing of heavy bonds against possible damage and providing severe penalties for failure to register, is supposed to have discouraged strikebreaking.<sup>19</sup> There is no adequate definition of "spy," however, and no data on the enforcement of this act is at hand. A certain amount of action by state administrative officers has been effective,<sup>20</sup>

<sup>11</sup> 49 Stat. 452 (1935); 29 U.S.C.A. §§ 157-66 (1935).

<sup>12</sup> Crawford & Moses' Ark. Dig. Stat. 1921, §§ 2792, 2793; Colo. Ann. Stat. 1930, § 4481; Baldwin's Carroll's Ky. Stat. 1930, § 1376; Mo. Rev. Stat. 1929, § 4237; Mont. Rev. Code Ann., 1935, § 10925; Neb. Comp. Stat. 1929, § 28-725; Okla. Stat. 1931, § 10881; Tenn. Code Ann. 1932, § 11365; Wis. Stat. 1931, §§ 348, 472.

<sup>13</sup> See Witte, *The Government in Labor Disputes* 211 (1932).

<sup>14</sup> Crawford and Moses' Ark. Dig. Stat. 1921, §§ 2790, 2791; Ill. State Bar Stats. 1935, c. 125, §§ 28, 29; Ky. Stat. 1930, § 1376; Mass. Gen. L. 1932, c. 149, § 176; Mo. Rev. Stat. 1929, § 4233; Neb. Comp. Stat. 1929, § 28-726; Cahill's N.Y. Cons. L. 1930, c. 41, § 1845; 18 Purdon's Pa. Stat. Ann. 1930, § 871; Tex. Comp. Stat. 1928, art. 5207; W. Va. Code Ann. 1932, § 6037; Wis. Stat. 1931, § 66.11(1).

<sup>15</sup> See 88 New Republic 242 (Oct. 7, 1936) for description of tactics used by large employers in industrial disputes.

<sup>16</sup> Cal. Gen. L. 1930, act 4728; Colo. Ann. Stat. 1930, §§ 4479, 4480; Me. Rev. Stat. 1930, c. 54, §§ 7, 8; Mass. Gen. L. 1932, c. 149, §§ 22, 23; Minn. Stat. 1927, §§ 10392, 10393; Mont. Rev. Code Ann. 1935, §§ 11220, 11222; Nev. Comp. L. 1929, §§ 2772, 2774; N.H. Pub. L. 1926, c. 176, §§ 36, 37, 38, 39; Ohio Ann. Code 1934, § 89603 (d); 43 Purdon's Pa. Stat. Ann. 1931, §§ 607, 608; Tenn. Code Ann. 1932, §§ 11363, 11364; Wis. Stat. 1931, § 103.43.

<sup>17</sup> 9 News Week, no. 6, p. 11 (Feb. 6, 1937); for a fictionalized account see Zara, *Give Us This Day* 386 ff. (1936).

<sup>18</sup> Wis. Stat. 1931, § 175.07.

<sup>19</sup> Witte, *op. cit. supra* note 13.

<sup>20</sup> Milwaukee city officials put 150 Bergoff men in jail when they attempted to break the traction strike in 1934. In 1934, Governor Talmadge of Georgia stopped the activities of Bergoff strikebreakers by taking troops into strike areas. It is not clear whether Governor Talmadge stopped the strikebreaking or merely superseded the strikebreakers. See 11 Fortune 56, 92 (Jan. 1935); 81 New Republic 124, 125 (Dec. 12, 1934).

but even that has been crippled by the courts,<sup>21</sup> and it has never attacked spies. Frequently action by state administrative or executive officers increases the violence, and it is usually indistinguishable from the strikebreaking itself.

Federal attack on strikebreaking originated in 1915 with President Wilson's Commission on Industrial Relations.<sup>22</sup> The committee's report was extremely hostile and contained a number of specific suggestions for legislation. It advocated: (1) Abolition in interstate commerce of private detective agencies, practically all of which are primarily strikebreaking organizations; (2) Imposition of severe restrictions on deputizing sheriffs, such as prohibition of non-resident or ex-convict deputies and pay from private sources; (3) Criminal penalties for transportation of men across state lines either with arms or with the intention of arming them. Nothing was done with the commission's report until the Wagner National Labor Relations Act<sup>23</sup> in 1935 and the Byrnes Strikebreakers Act<sup>24</sup> in 1936. Although it does not specifically mention the problem, perhaps really because of its generality, it is probable that the Wagner Act can be used to combat strikebreaking more effectively than anything before devised. Section 8 (1) of the Wagner Act makes it an unfair labor practice to "interfere with, restrain, or coerce" employees in the exercise of their rights to organize or bargain collectively. No doubt all three forms of strikebreaking are properly within this definition.<sup>25</sup> But the Wagner Act has two weaknesses in attacking strikebreaking: (1) There are no criminal penalties,<sup>26</sup> and unless there is the threat of *ex post facto* prosecution, damage will be done before it can be stopped. (2) The act applies only to employers, leaving the powerful agencies untouched.

The Byrnes Act avoids the two faults of the Wagner Act but has few of its virtues. The text follows:

Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person with intent to employ such person to obstruct or interfere, in any manner, with the right of peaceful picketing during any labor controversy affecting wages, hours, or condition of labor, or the right of organization for the purpose of collective bargaining, shall be deemed guilty of a felony and shall be punishable by a fine not exceeding \$5000, or by imprisonment not exceeding two years, or both, in the discretion of the court.<sup>27</sup>

<sup>21</sup> Mayor enjoined from ousting guards and replacements. *American Steel and Wire Co. v. Davis*, 261 Fed. 800 (D.C., Ohio 1919); *Schenectady Ry. Co. v. Whitmeyer*, 121 Misc. 4, 199 N.Y.S. 827 (1923). Governor enjoined from military intervention in strike. *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (Minn. 1936), noted in 3 *Univ. Chi. L. Rev.* 655 (1936).

<sup>22</sup> 45 *Current History* 77, 78-80 (Feb. 1937).

<sup>23</sup> See note 11 *supra*. <sup>24</sup> 49 Stat. 1899 (1936); 18 U.S.C.A. § 407a (supp. 1936).

<sup>25</sup> *Fruehauf Trailer Co. v. National Labor Relations Board*, 58 Sup. Ct. — (1937).

<sup>26</sup> The Railway Labor Act, which sets up mediation procedure similar to that of the Wagner Act, has substantial criminal penalties. 44 Stat. 577 (1926); 45 U.S.C.A. § 152-tenth (supp. 1936). These provisions have not been tested for constitutionality. See note 50 *infra*.

<sup>27</sup> See note 23 *supra*.

In the avoidance of constitutional difficulties, both under the commerce clause of Article One and the due process clause of the Fifth Amendment, some care was apparently taken in the drafting of the act.<sup>28</sup> It is a safe generalization that an activity is within the commerce power if it has a "direct effect" upon interstate commerce.<sup>29</sup> But it is apparent that what would be a direct effect in an activity involving the transportation of things is not necessarily a direct effect in one involving transportation of people.<sup>30</sup> It is usually argued that a regulation involving the transportation of people across state lines is properly within the commerce power where the transportation is the *essential* activity attacked.<sup>31</sup> In the baseball<sup>32</sup> and vaudeville<sup>33</sup> cases it was contended that the Sherman Act applied to combinations monopolizing certain exhibitions. Here, thought the Court, although some interstate travel was unavoidable, the *essential* activity was the stationary exhibition. In the Mann Act cases,<sup>34</sup> however, Congress had expressly made the transportation the essential activity from its point of view, and this it could do under the commerce power even though the undoubted intent was to prevent the objectionable ultimate use of the woman transported.<sup>35</sup> As an apology for this curious reasoning it is sometimes suggested that white slave traffic is either more evil in some sense than amusement monopolies, and hence less deserving of protection, or more peculiarly needful of federal regulation. Just how this applies to the "nonpecuniary interstate fornication" of the *Caminetti* case is unclear. At any rate the Byrnes Act seems fairly safe under all of these apparently irrelevant criteria. With elaborate care the framers made interstate transportation the *essential* activity,<sup>36</sup> the ultimate

<sup>28</sup> See H.R. Rep. no. 2431, 74th Cong., 2d Sess. p. 2 (1936).

<sup>29</sup> *Minnesota Rate Cases*, 230 U.S. 352, 397 (1912); *Hooper v. California*, 155 U.S. 648, 655 (1894); *United Leather Workers v. Herkert*, 265 U.S. 457, 464-67 (1924).

<sup>30</sup> Compare *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), with *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). Compare *Binderup v. Pathe News Exchange*, 263 U.S. 291 (1923) with *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271 (1923). See also *Champion v. Ames*, 188 U.S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

<sup>31</sup> *Passenger Cases*, 7 How. (U.S.) 282, 429 (1849); *Mobile v. Kimball*, 102 U.S. 691 (1880); *Covington Bridge Co. v. Kentucky*, 154 U.S. 204 (1893).

<sup>32</sup> *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

<sup>33</sup> *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271 (1923); *Hart v. Keith Vaudeville Exchange*, 12 F.(2d) 341 (C.C.A. 2d 1926).

<sup>34</sup> *Caminetti v. United States*, 242 U.S. 470 (1917); *Hoke v. United States*, 227 U.S. 308 (1913).

<sup>35</sup> ". . . a person may move or be moved in interstate commerce, and the act under consideration was drawn in view of that possibility." *Hoke v. United States*, 227 U.S. 308, 320 (1913). See also *Gooch v. United States*, 297 U.S. 124 (1936) (Federal Kidnapping Act held constitutional); *Champion v. Ames*, 188 U.S. 32 (1903) (prohibition of interstate transportation of lottery tickets held constitutional); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (Pure Food Act held constitutional). In *Ky. Whip & Collar Co. v. Ill. Cent. R. Co.*, 57 Sup. Ct. 277 (1937), special emphasis was put upon "evils" irrelevant to the transportation.

<sup>36</sup> See H. R. Rep. no. 2431, 74th Cong., 2d Sess., p. 2 (1936).

strikebreaking appearing (as in the Mann Act) only as a factor in the intent of the accused at the time of transportation. A few brief glimpses of the horrors of strikebreaking should convince the Court of its "evil." And the immensity of some of the strikebreaking organizations bears voluble testimony to the need for federal regulation.<sup>37</sup>

Similar care has been used to avoid due process difficulties. While the question is largely unexplored, there is considerable evidence that courts will not countenance too great restriction upon employers' right to self-help against labor. An employer has a constitutional right to hire persons, no matter where they reside, to operate his factory.<sup>38</sup> He also has a right to protect his property against violence and destruction.<sup>39</sup> To deprive him of these would clearly be in violation of "due process." On the other hand, peaceful picketing and the right of organization have been recognized as proper labor activities.<sup>40</sup> Interpretation of these generalities has gradually come to favor labor. In spite of the admitted propriety of labor organizations, it was not until the upholding of the federal Railway Labor Act in 1930<sup>41</sup> that the federal courts admitted a constitutional power to restrain employers from using coercion against unions. The Erdman Act of 1898,<sup>42</sup> making it criminal for interstate carriers to discharge or discriminate against employees for union activity, was invalidated in *Adair v. United States*.<sup>43</sup> One of the grounds was that it was a violation of the due process clause to compel any person in the course of his business and against his will to accept or retain the personal services of an employee for whatever reasons he might have. The effect of this decision was greatly reduced by *Texas & N.O.R. v. Brotherhood of Railway & Steamship Clerks*,<sup>44</sup> which upheld a section of the Railway Labor Act providing that railroad employees, in designating their representatives for collective bargaining, were entitled to enjoin the "interference, influence, or coercion" of their employers.<sup>45</sup> The *Adair* case was distinguished on the ground that the statute in question did not interfere with the "normal exercise of the right" of the employer to select and discharge employees, but that it prevented only the influencing of free choice of representatives to promote collective bargaining.<sup>46</sup> The same distinction was made in *Virginian*

<sup>37</sup> See note 8 *supra*.

<sup>38</sup> *Schenectady Ry. Co. v. Whitmeyer*, 121 Misc. 4, 199 N.Y.S. 827 (1923).

<sup>39</sup> *American Steel and Wire Co. v. Davis*, 261 Fed. 800 (D.C. Ohio 1919).

<sup>40</sup> See Frankfurter and Greene, *The Labor Injunction*, 33, 181-82, 207-8 (1930); *American Foundries v. Tri-City Council*, 257 U.S. 184, 203, 206-7 (1921); *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111 (1840).

<sup>41</sup> 44 Stat. 577 (1926); *Texas & N.O.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930).

<sup>42</sup> 30 Stat. 424, c. 370 (1898).

<sup>43</sup> 208 U.S. 161 (1908). A similar state statute was later invalidated on substantially the same grounds in *Coppage v. Kansas*, 236 U.S. 1 (1914).

<sup>44</sup> 281 U.S. 548 (1930).

<sup>45</sup> 44 Stat. 577 (1926). <sup>46</sup> 281 U.S. 548, 571. See 4 *Univ. Chi. L. Rev.* 109, 117 (1936).

*Ry. Co. v. System Federation No. 40*,<sup>47</sup> which upheld the amended Railway Labor Act.<sup>48</sup> Finally, in the *Jones & Laughlin Steel Co.* case<sup>49</sup> it was held constitutional to prohibit an employer from in any way encouraging or discouraging membership in a labor organization. Today, little remains of the rule in the *Adair* case.

It will be noted, however, that there is no case since the *Adair* and *Coppage* cases which involved criminal provisions. In the *Adair* case the rule of absolute freedom to contract was qualified "by the fundamental condition that no contract . . . can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests . . ." <sup>50</sup> Since the penalties were there struck down, this phrase may be taken to make a distinction between "forbid" and "make criminal." One possible justification for the distinction is the rule in *International Harvester Co. v. Kentucky*.<sup>51</sup> Where the terms of a criminal statute are excessively vague, it will be unconstitutional because no workable criterion is created for avoiding the penalties. Similar statutes providing for injunctions and rendering contracts unenforceable are unobjectionable because in the former there will be no enforcement until a court sets up definite standards and in the latter the penalty is not so great.<sup>52</sup> To obtain some idea of the uncertainty of the rule of the *International Harvester* case, compare *Nash v. United States*,<sup>53</sup> in which the rule of reason was held not to render the criminal provisions of the Sherman Anti-Trust Law too vague.

It is difficult to say how much the apparent attempt to avoid constitutional difficulties has crippled the Byrnes Act. It has frequently been suggested that the phrase, "peaceful picketing," is a contradiction in terms, and although it is now generally supposed to have some meaning, its scope has been so limited that it is almost non-existent.<sup>54</sup> Whether the trend will be reversed in view of the recent Wagner Act decisions<sup>55</sup> is conjectural. The Byrnes Act, of course, refers to peaceful picketing only as a factor in the intent of the defendant at the time of transportation, and the intent will be unexpressed. Suppose there is both peaceful and non-peaceful picketing or only non-peaceful picketing. Will the inference be that there is no intent to interfere with whatever peaceful

<sup>47</sup> 57 Sup. Ct. 592, 605 (1937).

<sup>48</sup> 48 Stat. 1186 (1934); 45 U.S.C.A. § 152(3) (1935).

<sup>49</sup> 58 Sup. Ct. — (1937).

<sup>50</sup> 208 U.S. 161, 172 (1908).

<sup>51</sup> 234 U.S. 216 (1914).

<sup>52</sup> See, for example, Federal Trade Commission Act, 38 Stat. 717, 719-21 (1914); 15 U.S.C.A. §§ 41-51 (1927).

<sup>53</sup> 229 U.S. 373 (1913).

<sup>54</sup> *Atchison, T. & S.F. Ry. v. Gee*, 139 Fed. 582 (C.C. Iowa 1905). See Cooper, *The Fiction of Peaceful Picketing*, 35 Mich. L. Rev. 72 (1936).

<sup>55</sup> *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 58 Sup. Ct. — (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 58 Sup. Ct. — (1937); and accompanying cases.

picketing might arise? It is clear that peaceful picketing may momentarily become non-peaceful, and especially that it may be made so by judicious strikebreaking tactics. Can it successfully be urged that there is no adequate showing of intent merely from transportation aimed at a strike where there is peaceful picketing? Or on the other hand, since strikebreakers' lack of discrimination is notorious, would there be an inference of intent merely from the transportation regardless of the type of strike aimed at? If so, the requirement would be superfluous, except for its function in warding off the commerce clause. It is more likely, however, that the requirement will work positive injury, that it will lead the courts to demand specific, separate evidence of intent.

The phrase "right of organization" is more important, not only because the intent to interfere therewith should be easier to prove but because it is apparently aimed at spies and replacements as well as guards. It should be noticed, however, that the statute is ambiguous in this respect. The phrase could either be the object of the preposition "with," and thus be co-ordinate with "right of peaceful picketing," or the object of the participle, "affecting," and merely purposive of the "peaceful picketing." It would seem that the former is correct, not only because the latter would reduce the act to a nullity but because there is otherwise no function for the word, "or," before "condition of labor." This ambiguity can be dispelled by the insertion of another "with" before "the right of organization." Thus interpreted, the chief difficulties with the phrase lie in ascribing some function to the word, "right," and in determining whether "organization" merely refers to the act of assembling a union or also includes the maintenance of the union and pursuance of its aims. In view of the federal courts' traditional hostility to labor, the stricter construction is by no means impossible. Under it the impediment to any of the three forms of strikebreaking would be negligible. Most of the spies' work consists of corrupting unions from within, and, of course, guards and replacements do not become useful until the union has considerable power. But although more than justified by the wording of the phrase, such a construction not only would destroy the act but would be absurd because incapable of application. There is no practical distinction between building and maintaining a union, and anything which hampers the effectiveness of a union's activity necessarily decreases its appeal to members and prospective members. As to the word, "right," it would not seem to be a strained interpretation to say that strikebreaking does not interfere with the right of organization but merely impedes the exercise of that right. The National Labor Relations Board has ignored "right" in the corresponding phrase of the Wagner Act,<sup>56</sup> but it invites inept construction, and the courts have not understood the spirit of labor legislation as the Board apparently does.

<sup>56</sup> The phrase used by the NLRB has almost exclusively been "exercise of rights." See *In the Matter of Friedman—Harry Mark Clothing Co., Inc. and Amalgamated Clothing Workers of American*, case no C-50, 1 *Decisions and Orders of the National Labor Relations Board* 432, 451 (1936).

Finally it appears that only those who "transport" with intent to "employ" the strikebreakers are affected by the act. Presumably designed to protect the carrier, this provision seems clearly to provide a complete escape. If the strike-breaking organization transports the men with no aid from the industry management, and the management employs them with no aid from the strike-breaking organization, there is no one who falls within the act. This is also true, of course, where the recruitment was within the state or was so carefully arranged that it appeared to be within the state, but that is an unavoidable incident of the method used for inclusion within the commerce power. The company owner will easily avoid responsibility, either by refraining from aiding or abetting in the transportation, or, if "employ" is strictly construed, by not entering into an employment relationship with the strikebreakers.<sup>57</sup> The carrier is amply protected by the "knowingly," and the use of "employ" is unfortunate and unjustifiable.

As usual, however, criticism is easier than construction. The statute should attack strikebreaking in its most vicious phase, where violence is contemplated on both sides, and it should constitute so strong a deterrent that it need hardly ever be enforced. To both of these goals the due process clause is a difficult hurdle. The statute should be general enough to attack all the various forms of union-breaking yet not so vague that it can be construed away. General or specific, it will have to cover a number of fields which are as yet very imperfectly understood. First of all, some basis must be found for federal regulation other than transportation of the men. If the view of interstate commerce taken in the Wagner Act decisions<sup>58</sup> is to stand, the federal power can be based on the commerce of the employer, and the statute can be pointed directly at interference with the workers. If possible, it should attack the great strikebreaking organizations with special force, either by prohibiting them completely in interstate commerce, as the Wilson Commission suggested, or by imposing heavier penalties on them, or, possibly, by using the tax power to confiscate all of their profits.<sup>59</sup> The strikebreakers, themselves, should not be immune, although their penalties should, perhaps, be less harsh. It is improbable that the due process difficulties of limiting an employer's power to protect his property would extend to limitations upon strangers, the strikebreakers and their agencies. Indirect

<sup>57</sup> Customarily the men are paid, armed, and captained by the agency, but housed and fed by the company.

<sup>58</sup> See note 55 *supra*.

<sup>59</sup> *Cf.* Tax on Unjust Enrichment, 49 Stat. 1734 (1936) (80% tax on "windfalls" resulting from recovery of impounded tax payments when the AAA was held unconstitutional). See *Doremus v. United States*, 249 U.S. 86 (1919) (prohibitory tax on narcotics held constitutional); *McCray v. United States*, 195 U.S. 27 (1904) (margarine tax constitutional). But see *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (tax on child labor held unconstitutional); *Hill v. Wallace*, 259 U.S. 44 (1922) (tax on "non-contract" grain exchanges held unconstitutional). The *Bailey* and *Hill* cases are easily distinguishable, since there the rate of "taxation" bore no relationship to the evil attacked.

restraints can be imposed by regulating the transportation of arms or by regulating the use of arms which have been transported in interstate commerce. The words, "right" and "employ," should be avoided and words like "strike-breaking replacements" and "industrial spying" should be adopted in the hope that the courts can work out adequate definitions. "Peaceful picketing" and "organization" are far less satisfactory than the "concerted activities" of the Wagner Act. At present the most important task is in pursuing investigations like that of the La Follette Committee, since it is only by thorough understanding of what constitutes strikebreaking that it can be adequately defined and, once proper definitions are formed, the most difficult drafting problem is past.