JUDICIAL INTERPRETATION OF LABOR LAWS

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I. INTRODUCTION

OUR American legal system has endowed the judge with a greater power to shape the law than he has enjoyed since courts were the sole lawgivers.¹ With the particular aspect of that power which especially characterizes our system, the destruction of statutes by declaring them unconstitutional, we shall not here concern ourselves.² But, due either to carelessness in drafting of legislation or to inert acquiescence in misinterpretation, judges exercise the power to interpret statutes more extensively in the United States than in other countries in the more general field of interpretation.

Judge-made law is not novel, of course, even in communities with explicit written codes. Instances of judicial embroidering on the law come down to us even from ancient Greece.³ In England the courts played a notable role in evading the declared purposes of the lawmakers as embodied in successive land laws.⁴ Repeated efforts at reform during the nineteenth century were delayed by judges undisposed to recognize the need for change.⁵ It is seldom that the judges have been advance agents of the new; often they have tried to perpetuate the outmoded. Much judicial action has run counter to the will of the people, negating the

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¹ Such lawmakers were usually aristocrats or priests. See Maine, *Ancient Law* 11-13 (1st Am. ed. 1864).

² It is, however, an error to suppose that the American system is unique in permitting judges to declare laws unconstitutional. The practice is general in Canada and Australia, (see reference by Frankfurter, J., in *Graves v. New York*, 359 S. Ct. 595 (1939)) and has even developed in the continent of Europe. See Haines, *Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries*, 24 *Am. Pol. Sci. Rev.* 583 (1930); Radin, *Judicial Review of Statutes in Continental Europe*, 41 *W.Va. L.Q.* 112 (1935).

³ See Vinogradoff, *Outlines of Historical Jurisprudence* 79, 80 (1922).

⁴ This "judicial legislation" was, in the main, enlightened. See Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain* 163 ff. (1758); Digby, *An Introduction to the History of the Law of Real Property* 224, 247-52, 345, 363, 369, 370 (4th ed. 1892). But see Ames, *Origin of Uses and Trusts*, 21 *Harv. L. Rev.* 261, 270 (1908).

⁵ This conservative tendency was "justified" by the maxim that statutes in derogation of the common law were to be strictly construed. See Sedgwick, *Interpretation and Construction of Statutory and Constitutional Law* 267-75 (2d ed. 1874). For instances of construction in defiance of the will of the legislature see *id.* at 175, 259-65. See also Landis, *Statutes and the Sources of Law*, *Harvard Legal Essays* 213, 217, 218 (1934).

democratic process, preferring the rule of the "best minds." This resistance of the judiciary can best be studied in those fields which have had respectively the greatest significance for their times.

The field of labor relations has such significance today. And we shall examine, therefore, current judicial attitude toward the laws which regulate injunctions and seek to protect collective bargaining.

Because we have collected, for the most part, "horrible examples," does not imply a belief that all judges misinterpret laws, or even that any judges always do so. Nor do we hold that every case here discussed was incorrectly decided. There are many, no doubt, who will disagree with some, or who may disagree with all, of our conclusions, with respect to the soundness of the interpretation in particular cases. We believe, however, that the instances about to be presented show clearly the dependence of a community on its judges, for even a correct decision may be judicial legislation, in a sense, when there is room for reaching the opposite conclusion.

The following discussion, after a brief review of the Clayton Act, analyzes judicial interpretation of the term "labor dispute" as found in most anti-injunction laws. In connection with this we briefly consider the application by some judges of the theory of the "inherent power" of the courts in order to avoid such laws. The discussion then treats two aspects of the labor relations laws, the "substantial evidence rule" and the circumstances under which discharges have been upheld. Without attempting a comprehensive analysis of the material,⁶ we have selected cases primarily to illustrate the power of the judiciary to thwart the will of the people.

II. "DECLARATORY OF THE COMMON LAW"

Plus ça change, plus c'est la même chose.—Too often has the cynical motto been applied to the history of legislative attempts at reforming the

⁶ For comprehensive discussions see Frankfurter and Greene, *The Labor Injunction* (1930); Lien, *Labor Law and Relations* (1938); Oakes, *The Law of Organized Labor and Industrial Conflicts* (1927); Witte, *The Government in Labor Disputes* (1932). See also Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts*, 30 Ill. L. Rev. 854 (1936); Larson, *The Labor Relations Acts—Their Effect on Industrial Warfare*, 36 Mich. L. Rev. 1237, 1272 (1938); Warm, *A Study of the Judicial Attitude toward Trade Unions and Labor Legislation*, 23 Minn. L. Rev. 255 (1939); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195 (1938); articles in 5 *Law and Contemp. Problems* 175 ff. (1938); for recent cases see *Bulletins* issued monthly since July 1932 by the International Juridical Association. The most important cases are to be found in convenient form in Landis, *Cases on Labor Law* (1934), Witt, *Supp.* (1937). Dean Landis' introduction to the original collection is an excellent survey. Recent New York cases have been summarized by Galenson, *N.Y.L.J.*, p. 2070 (May 5, 1939).

law. Especially is this so in the field of labor. Courts have often struck down laws designed to aid labor, by conservative construction of the constitution,⁷ and have emasculated them by interpretation. The most useful weapon in their varied armory has been the doctrine that the legislature intended merely to enact the law as it had already been handed down by the courts. As if the labor pains of law-making were readily undergone for any such futile purpose!

The judicial treatment accorded the Clayton Act⁸ constitutes a striking example of the perversity we have touched upon. These provisions resulted from years of struggle by organized labor to alleviate unjust hardship resulting from prosecutions and suits under the Sherman Act⁹ and from improvidently granted injunctions.¹⁰ Hailed as labor's "Magna Charta,"¹¹ its actual results have been only negligible. Indeed, in one respect it has proved a boomerang; under a little noticed alteration,¹² private persons were enabled to obtain injunctions; they did not need any longer to depend upon action by the government.¹³ Employers were naturally quick to use this advantage.¹⁴

The act contained two provisions which had been expected to be of benefit to labor. Section 6¹⁵ declared that labor was not a commodity and that the lawful activities of labor unions were excluded from the anti-trust laws; Section 20¹⁶ limited the issuance of injunctions. The first of these

⁷ See *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Truax v. Corrigan*, 257 U.S. 312 (1921), discussed in *Fraenkel, op. cit. supra* note 6, at 866, 861, 873.

⁸ See comments of Judge Amidon in *Great Northern Ry. Co. v. Brosseau*, 286 Fed. 414, 420 (D.C. N.D. 1923). See *Frankfurter and Greene, op. cit. supra* note 6, at 165-76.

⁹ See *Frankfurter and Greene, op. cit. supra* note 6, at 6-10; *Berman, Labor and the Sherman Act* (1930). Labor still suffers under this disability. See *United States v. Anderson*, 101 F. (2d) 325 (C.C.A. 7th 1939); *United States v. Internat'l Fur Workers Union*, 100 F. (2d) 541 (C.C.A. 2d 1938) *cert. denied* 59 S.Ct. 642 (1939); *Apex Hosiery v. Leader*, 90 F. (2d) 155 (C.C.A. 3d 1937), *rev'd as moot*, 302 U.S. 656 (1937). But in the action at law growing out of the Apex sit-down strike, damages of \$711,392 were obtained against the union, *N.Y. Times*, p. 1, col. 5 (April 4, 1939). How this law, aimed at monopolies, came to be applied against strikers, is an interesting chapter in judicial lawmaking. The court in the Apex case used the cases decided under the Wagner Act as justification for ruling that interstate commerce was involved—ignoring earlier contrary decisions, such as *Industrial Ass'n v. United States*, 268 U.S. 64 (1925) and *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933).

¹⁰ *Frankfurter & Greene, op. cit. supra* note 6, *passim*.

¹¹ *Id.* at 164; *Lien, op. cit. supra* note 6, at 616.

¹² 38 Stat. 737 (1914), 15 U.S.C.A. § 26 (1927).

¹³ See 26 Stat. 209 (1890), 15 U.S.C.A. § 4 (1927).

¹⁴ See *Fraenkel, op. cit. supra* note 6, at 866, note 63.

¹⁵ 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1927).

¹⁶ 38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1927).

has been completely disregarded. The second was soon shorn of its usefulness by Chief Justice Taft's holding that it was "merely declaratory of what was the best practice always,"¹⁷ and by the holding that the section was limited to situations in which there was a relationship of employer and employee between the parties.

This latter limitation was first enunciated in *Duplex Printing Co. v. Deering*.¹⁸ In that case unions endeavored to prevent their members from working on presses which had been manufactured by the plaintiff and sold to concerns for which the union members worked; it presented, that is, a boycott of the type often described as "secondary." The majority of the Court held that the section was inapplicable to the defendants, since they had never been employees of the plaintiff and ruled that Congress had not intended to legalize the secondary boycott. Justices Brandeis, Holmes, and Clarke dissented, believing that the economic relationship between the union and the manufacturer, not the legal relationship of employer and employee, controlled. Justice Brandeis said in conclusion:

All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.¹⁹

In *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*²⁰ the principle of the *Deering* case was extended. In the earlier case there had been a psychological reason for the majority decision in that, in order to achieve a closed shop, a powerful union had taken the offensive against a single manufacturer. In the later case no such element was present, since the members of a single craft merely sought to protect themselves against anti-union action by a powerful organization of employers. Nevertheless, the majority of the Court considered the *Deering* case controlling. Even Justices Sanford and Stone saw no distinction and reluctantly concurred. Holmes and Brandeis, however, believed that a distinction was justified, and that the combination of employees in the *Bedford* case was as "reason-

¹⁷ Taft, C. J., in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). It should be noted here, however, that Mr. Taft made an excellent statement of the usefulness of labor organizations and held that, in a direct labor controversy, peaceful persuasion could not be enjoined even when carried on by persons who had never been employees. He condemned mass picketing, however, as necessarily intimidatory.

¹⁸ 254 U.S. 443 (1921).

¹⁹ *Id.* at 488.

²⁰ 274 U.S. 37 (1927).

able" as the combinations of capital which the Supreme Court had approved in the *Steel* and *United Shoe Machinery* cases.²¹

The lower federal courts followed the lead of the Supreme Court and limited the section so that union organizers were not given the right to proselytize in non-union territory.²² Most state courts interpreted their own laws in like limited fashion.²³

Against this background arose demands for more explicit legislative declaration; demands which culminated in the Norris-LaGuardia anti-injunction law,²⁴ and similar state laws which expressly banned enjoining of peaceful picketing.²⁵ But the notion that new laws are not really new has reappeared in New York.²⁶ The Court of Appeals²⁷ has not as yet repudiated this doctrine.

The impetus of judges to misconstrue this type of statute derives from

²¹ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. United States Shoe Machinery Co.*, 247 U.S. 32 (1918).

²² See *Ferguson v. Peake*, 18 F. (2d) 166 (App. D.C. 1927); *Internat'l Organization v. Red Jacket Consol. Coal & Coke Co.*, 18 F. (2d) 839 (C.C.A. 4th 1927). See Landis, *op. cit. supra* note 6, at 141. For other cases see Frankfurter and Greene, *op. cit. supra* note 6, at 165 note 128, 173 note 159, 174 notes 160-4.

²³ A very recent instance is *Swing v. A. F. of L.*, 298 Ill. App. 63, 18 N.E. (2d) 258 (1938). There the Appellate Court for the First Division, noting that the Illinois law, Smith-Hurd's Ill. Ann. Stat. c. 48, § 2a (1930), was modeled on the Clayton Act, followed the interpretation of that law in the *Deering* case, 254 U.S. 184 (1921), and rejected a more liberal interpretation by the Appellate Court for the Second Division in *Schuster v. Internat'l Ass'n of Machinists*, 293 Ill. App. 177, 12 N.E. (2d) 50 (1937). In this earlier case the court had followed the recent decisions of the United States Supreme Court and the Wisconsin Supreme Court interpreting the modern anti-injunction laws (see notes 32, 33 *infra*). The court in the *Swing* case held these cases not applicable on the ground that they rested on modern laws which, unlike the Illinois law, were expressly applicable whether or not there was a relationship of employer and employee between the parties. Judge McSurley characterized the *Schuster* case as "judicial legislation," ignoring that the narrow interpretation of the Clayton Act on which he relied had been widely condemned as judicial legislation (see note 8 *supra*). For earlier cases see Frankfurter and Greene, *op. cit. supra* note 6, at 181, notes 184-6.

²⁴ 47 Stat. 70 (1932), 29 U.S.C.A. §§101 ff. (Supp. 1938).

²⁵ See Fraenkel, *op. cit. supra* note 6, at 859, note 29. Since 1935 the following five states have enacted anti-injunction laws: Kan. Stat. 1935, c. 60, art. 11, § 60-1104-7; N.M.L. 1939, c. 195; Pa. L. 1937, act 308, held constitutional *Lipoff v. United Food Workers*, 33 Legal Intelligencer 599 (Pa. 1938); R.I.L. 1936, c. 2359; Wyo. L. 1937, c. 15. But in some states serious restrictions on picketing have recently been passed: Oregon, by referendum adopted Nov. 8, 1938; see also Minn. Acts 1939, c. 440, § 11.

²⁶ *Remington Rand Inc. v. Crofoot*, 248 App. Div. 356, 289 N.Y. Supp. 1025 (1936) *aff'd* 279 N.Y. 65, 18 N.E. (2d) 37 (1938); *May's Fur & Ready-to-Wear, Inc. v. Bauer*, 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939); *De Agostina v. Holmden*, 157 Misc. 819, 285 N.Y. Supp. 909 (1935); *Busch Jewelry Co. v. United Retail Employees' Union*, 168 Misc. 224, 5 N.Y.S. (2d) 575 (1938) *aff'd* 255 App. Div. 970, 8 N.Y.S. (2d) 819 (1938).

²⁷ See *Goldfinger v. Feintuch*, 276 N.Y. 281, 288, 11 N.E. (2d) 910, 913 (1937).

their belief that peaceful picketing is objectionable in certain situations, such as those in which rival unions are involved, a secondary boycott is being carried on, the owner works without any employees, or the strike is for some illegal purpose. Judges often fail to understand the broad reasons of social policy which justify peaceful picketing under *all* conditions.²⁸ They therefore attribute an intention to legislatures to exclude "objectionable" picketing from the protection of the statutes. This they do primarily through perversion of the term "labor dispute."

A. WHAT IS A LABOR DISPUTE?

The drafters of the various anti-injunction laws²⁹ attempted to define their terms in a fashion so comprehensive as to defy judicial misinterpretation. These statutes expressly state that their procedural and substantive provisions shall be applicable to all controversies having to do with conditions of work or union representation, regardless of whether or not the disputants stand in the relation of employer and employee. We shall first consider the application of these laws to situations involving competing unions.

In *United Electric Coal Companies v. Rice*³⁰ the Court of Appeals for the Seventh Circuit ruled that there was no labor dispute when an employer was caught between two rival unions. In that case, after an employer had signed a contract with a union, some of the employees broke away from the union and went on strike because the employer refused to break the contract and negotiate with a new union. Judge Evans said that, to make the statute applicable, the dispute "must be one between the employer and the employee or growing directly out of their relationship." Recognizing that there might be cases in which a dispute between two unions was also one with the employer, he held that, in the instant case, such was not the situation since no controversy existed over terms of employment. The refusal of the Supreme Court to review this decision is, nevertheless, without significance, since the judgment rested partially on a finding that unlawful acts had been committed and that all the conditions required by the statute had been complied with.

²⁸ Indeed, there is warrant for the opinion that the right to picket peacefully is guaranteed by the Constitution as an incident to freedom of speech. *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 478 (1936); *Schuster v. Internat'l Ass'n*, 293 Ill. App. 177, 193, 12 N.E. (2d) 50, 56 (1937); *Individual R. F. S. Owners Ass'n v. Penn Treaty Ass'n*, 33 Legal Intelligencer 100 (Pa. 1938). See also *Kramer Hosiery Company v. American Fed. F.F.H. Workers*, 305 Pa. 206, 215, 157 Atl. 588, 591 (1931); *In re Lyons*, 27 Cal. App. 182, 81 P. (2d) 190 (1938). See 48 Yale L. J. 308, 312 (1938).

²⁹ See notes 24 and 25 *supra*.

³⁰ 80 F. (2d) 1 (C.C.A. 7th 1935) *cert. denied* 297 U.S. 714 (1936).

The same Circuit Court applied the same rule in *Lauf v. Skinner*.³¹ Here also a conflict between two unions was involved, but the union which picketed had never had any members in the plaintiff's employ. In granting an injunction Judge Sparks declared that for the plaintiff to have complied with the defendant union's request would have constituted interference with the rights of its employees to select their own union in violation of both state and federal law. This time, after final decision, the Supreme Court took jurisdiction and reversed.³²

The decision of the Supreme Court was five to two; Justices Cardozo and Reed did not participate and Justices Butler and McReynolds dissented. Mr. Justice Roberts held that, since the acts complained of had all occurred in Wisconsin, the state law controlled and the interpretation of that law by the state court³³ was binding on the federal court.³⁴ Of the Norris-LaGuardia Act he said only that its definition was substantially the same as that of the state law and that the facts brought the case within both. He rejected the argument that the right of employees to be free from coercion had anything to do with the case at bar. While the opinion contains no reasoned repudiation of the construction adopted by the Circuit Court, it is a fair inference that the Supreme Court has rejected that construction and would reverse a similar ruling even though no question of state law were involved. The dissenting opinion of Mr. Justice Butler clearly indicates that he so construed the majority decision.

The same problem of rival unions led the Court of Appeals for the Third Circuit to a strange conclusion in *Union Premier Food Stores Inc. v. Retail Food Clerks and Managers Local*.³⁵ The defendant unions picketed, although originally they had no members in the plaintiff's employ and C.I.O. unions claimed to represent a majority. To rid himself of the pickets, the plaintiff negotiated with the defendant unions, the C.I.O. unions complained to the National Labor Relations Board, the Board ordered an

³¹ 82 F. (2d) 68 (C.C.A. 7th 1936), 90 F. (2d) 250 (C.C.A. 7th 1937).

³² 303 U.S. 323 (1938). It should be noted, however, that the Court did not pass upon the legality of the acts complained of, nor the constitutionality of the Wisconsin law, should it be interpreted as legalizing acts ordinarily considered unlawful. The case was reversed merely because the plaintiff had failed to prove the matters required to be established in order to conform to the Norris-LaGuardia Act.

³³ Wis. Stat. 1937, §§ 103.51-103.62 interpreted by *American Furniture Co. v. I.B. of T.C. and H. of A.*, 222 Wis. 338, 268 N.W. 250 (1936).

³⁴ Citing *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 477 (1936).

³⁵ 98 F. (2d) 821 (C.C.A. 3d 1938), 101 F. (2d) 475 (C.C.A. 3d 1939); 52 Harv. L. Rev. 327 (1938). But Judge Dickinson in *Sharp and Dohme v. District Warehouse Employees' Union*, 24 F. Supp. 701 (Pa. 1938), held this case not controlling because in the later case neither of the competing unions had asked the Labor Board's help.

election and the defendants again resumed picketing. Judge Dickinson in the District Court³⁶ held that an injunction could issue because the Labor Board had taken jurisdiction and the National Labor Relations Act³⁷ superseded the Norris-LaGuardia Act. On an application for a stay of the injunction, the majority of the Circuit Court, while disagreeing in part with the reasoning of Judge Dickinson, approved the issuance of the injunction.

Judge Davis (with the concurrence of Judge Buffington) concluded that the *Lauf* case was not controlling because, although the fact was otherwise,³⁸ he thought no contesting unions were involved. Judge Davis distinguished that case further, on the ground that there had been no authoritative ruling in Pennsylvania on the meaning of its state law, such as there had been in Wisconsin. The majority opinion is confused and suggests that whenever the Labor Board has taken jurisdiction there is no labor dispute under the Norris-LaGuardia Act.³⁹ Judge Biggs dissented, declaring the *Lauf* case controlling. Both opinions reject Judge Dickinson's interpretation that the provision in the National Labor Relations Act makes the Norris-LaGuardia Act inapplicable to proceedings taken to enforce the later law. They agree that this was not intended to affect proceedings other than such as might be brought by the Board to enforce its own orders. The rest of the discussion of the Wagner Act in these opinions was entirely unnecessary. It is to be hoped that the Supreme Court will take jurisdiction of this case and clear up the misconceptions in the prevailing opinion.

The Court of Appeals for the District of Columbia, in *Fur Workers Union v. Fur Workers Union*,⁴⁰ has recently taken a more correct view of the statute and denied an injunction in spite of the fact that the employer

³⁶ Not reported; see 2 L.R.R. Mar. 790 (1938).

³⁷ Relying on 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (h) (Supp. 1938).

³⁸ The decision of the Circuit Court in the *Lauf* case, 82 F. (2d) 68 (C.C.A. 7th 1936), clearly showed that rival unions were involved in that case.

³⁹ There is no doubt that an employer has a real grievance when he is picketed after he has signed a contract with a union certified by the Labor Board as representing a majority of his employees. Such a case was *Oberman v. United Garment Workers*, 21 F. Supp. 20 (Mo. 1937), where the court granted an injunction on the theory that the "labor dispute" had ceased with the certification. To what extent such picketing by a minority group should be permitted is, however, a legislative and not a judicial problem. For discussion of cases involving this conflict see 38 Col. L. Rev. 1243 (1938); 39 Col. L. Rev. 519 (1939); 16 N.Y. L. Q. Rev. 306 (1939); 23 Minn. L. Rev. 393 (1939); 48 Yale L. J. 1053 (1939); 6 Univ. Chi. L. Rev. 317 (1939). See also *M. & M. Wood Working Co. v. N.L.R.B.*, 101 F. (2d) 938 (C.C.A. 9th 1939).

⁴⁰ C.C.H. Lab. Law Serv. ¶18, 324. (App. D.C. 1939). See also *Blankenship v. Kurfman*, 96 F. (2d) 450 (C.C.A. 7th 1938).

was caught between two contending unions. The opinion, however, suggests that there is need for revision of the Wagner Act so as to permit an employer to call for an election. It may nevertheless be noted that the rules of the Board, not the Act, now prevent a demand for an election by an employer,⁴¹ and that the right to call for an election would not necessarily do away with picketing by competing unions. Nor, for that matter, does the Norris-LaGuardia Act prevent the issuance of injunctions, as is so often assumed by hostile judges. If the prescribed procedure is complied with an injunction may still issue to stop illegal practices.⁴² It is true that peaceful picketing may not be enjoined and that many people believe it to be as damaging as if disorderly.⁴³ The risk of loss attendant on any picketing is inherent in business, just as is the risk of loss from competition. Both are natural outgrowths of the capitalistic system. In any event, it is for the legislature, not the courts, to change the law, if change be needed.

But the doctrine that there is no labor dispute where rival unions are involved, especially when the picketing union has no members employed at the place picketed, has received new impetus in the courts of New York. In *May's Furs & Ready-to-Wear Inc. v. Bauer*.⁴⁴ the Appellate Division in Brooklyn so ruled without any reasoned discussion. Suit was brought by a retail store and by an association of the employees of that store to restrain picketing by a union of retail salespeople, and all picketing was enjoined after a trial.

In *Stalban v. Friedman*⁴⁵ Judge Cotillo recently disregarded both the decision of the United States Supreme Court in the *Lauf* case and that of the New York Court of Appeals in *Stillwell v. Kaplan*.⁴⁶ In the *Stalban* case a small restaurant which had made a contract with a union was picketed by members of a different union, none of whom was an employee. Judge

⁴¹ The National Labor Relations Board has indicated its readiness to consider a change in its rules so as to permit employers to ask for elections under certain conditions. See New York Times, p. 1, col. 2 (April 15, 1939). For experience under the New York law (N.Y.L. 1937, c. 443, § 705-3) which gives the Board discretion to allow an employer to ask for an election, see Gellhorn and Linfield, Politics and Labor Relations—N.L.R.B. Procedure, 39 Col. L. Rev. 339, 394 note 118 (1939); 7 I.J.A. Bull. 85, 96 (1939).

⁴² See Tri-plex Shoe Co. v. Cantor, 25 F. Supp. 996 (Pa. 1939).

⁴³ See cases cited by Warm, *op. cit. supra* note 6, at 274, note 56.

⁴⁴ 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939).

⁴⁵ 11 N.Y.S. (2d) 343 (1939). But see *Bergman v. Levenson*, N.Y.L.J., p. 1955 (April 28, 1939), where a contrary result was reached on the basis of the *Lauf* and *Fur Workers* cases. The court may, however, have been influenced by the fact that almost all of plaintiff's employees desired to be represented by defendant union.

⁴⁶ 259 N.Y. 405, 182 N.E. 63 (1932).

Cotillo held that no labor dispute existed under the New York law. He said that the *Lauf* case was not a binding precedent because it rested upon a determination by the Wisconsin Supreme Court of the meaning of its law. But, although Judge Cotillo conceded that the Wisconsin law was identical with that of New York, he made no attempt to distinguish the decision of the Wisconsin Supreme Court; he did not even mention it by name. He relied upon Judge Taft's statement, already referred to, that the Clayton Act was merely declaratory of the common law and assumed that the New York statute was of like character. He admitted that in 1932, in the *Stillwell* case, the Court of Appeals had permitted picketing, although none of the employees of the place picketed belonged to the picketing union. He contended that that case was not controlling, because since then New York had passed a Labor Relations Act which gave labor such protection in obtaining collective bargaining that protection against the issuance of injunctions should be restricted. There can be no doubt that in reaching his conclusion Judge Cotillo was usurping the functions of the legislature. That this is so becomes clear from the following excerpts from his lengthy opinion:

It is no answer to state merely that picketing must be permitted if it is peaceful and if solely economic issues are involved. Such statements clearly are incomplete and if the effect is to close up the small business, it is positively a menace to modern industry. Not alone the motives, but also the effect of such unrestrained picketing constitute the gravamen of the offense charged. . . .

But when picketing has illegality of purpose, as its objective, however it be disguised with other motives, if it is primarily designed to coerce and to destroy that which it finds opposing it, we face a species of fraud and violence which equity frowns upon and cannot ignore. Such attempted subjugation of the small employer thus becomes unlawful interference by defendants outside the allowable arena of industrial conflict. It cannot be legalized by statutory enactments (*Truax v. Corrigan*, 257 U.S. 312). It is wholly destructive of the historical power of equity to intervene (*Lauf v. Shinner*, 303 U.S. 323, at p. 340, *Butler, J.*).⁴⁷

Judge Cotillo referred also to various illegal acts committed by the pickets as justification for an injunction against *all* picketing. But the opinion is thoroughly colored by the idea that, since the purpose of the picketing was unlawful, it could be enjoined regardless of its manner.

The application of anti-injunction laws has been restricted by the doctrine that there is no labor dispute when the object of a strike is illegal or the means used are improper. In the *Donnelly* case⁴⁸ this doctrine was applied because the defendants were charged with an illegal conspiracy.

⁴⁷ 11 N.Y.S. (2d) 356, 358 (1939).

⁴⁸ *Donnelly Garment Co. v. I.L.G.W.U.*, 20 F. Supp. 767 (Mo. 1937), 21 F. Supp. 807 (Mo. 1937) rev'd on other grounds, 304 U.S. 243 (1938). See later decisions *contra*, note 50 *infra*.

Subsequent to the Supreme Court decision in the *Lauf* case⁴⁹ these views were abandoned in the federal courts.⁵⁰

In various states, courts still adhere to this doctrine. It has thus been held that a strike called for an illegal purpose creates no labor dispute, e.g., those called to compel the hiring of additional employees,⁵¹ to compel the use of "canned music" instead of live musicians,⁵² to compel payment to one employee of wages formerly paid to four,⁵³ to compel the hiring of a Negro employee in place of a white one,⁵⁴ to compel non-union employees to join a union,⁵⁵ or, in certain states, to compel a closed shop.⁵⁶

In some cases, also, the illegality of the means employed has been held to "outlaw" the union.⁵⁷ The notion, however, that illegality of means deprives a labor union of the benefit of the statutes is entirely unjustified. While the anti-injunction laws permit the enjoining of illegal acts, it is nevertheless impossible to permit a disregard of the procedural provisions

⁴⁹ Note 32 *supra*. See also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (a dispute over the race of employees held to be a labor dispute).

⁵⁰ *Grace Co. v. Williams*, 96 F. (2d) 478 (C.C.A. 8th 1938); *Donnelly Garment Co. v. I.L.G. W.U.*, 23 F. Supp. 998 (Mo. 1938) *aff'd* on this point, 99 F. (2d) 309 (C.C.A. 8th 1938).

⁵¹ *Wohl v. Bakery & Pastry Drivers & Helpers Local*, N.Y.L.J., p. 191 (Jan. 13, 1939).

⁵² *Opera on Tour, Inc. v. Weber*, 170 Misc. 272, 10 N.Y.S. (2d) 83 (1939).

⁵³ *Joerger v. Pittsburgh Musical Society*, 4 L.R.R. 110 (Pa. 1939).

⁵⁴ *Stevens v. West Philadelphia Youth Civic League*, 3 L.R.R. 691 (Pa. 1939) (two pickets were allowed, however).

⁵⁵ *Safeway Stores v. Retail Clerks' Union*, 184 Wash. 322, 51 P. (2d) 372 (1935); *Adams v. Building Service Employees Int. Union*, 3 L.R.R. 572 (Wash. 1939).

⁵⁶ In *Simon v. Schwachman*, 18 N.E. (2d) 1 (Mass. 1938) this result was reached by a ruling that the anti-injunction law was not intended to validate closed shop agreements. In a group of cases just decided by a California Appellate Court (*New York Times*, p. 1, col. 2, April 8, 1939) a similar result was reached by ruling that the California Labor Code § 921 (1938), which was enacted to outlaw yellow dog contracts, also forbade closed shop contracts. This result arose from the fact that the California law, unlike the Norris-LaGuardia Act, contains a provision barring agreements between employers and employees requiring membership in a union. Such provision was presumably intended to prevent compulsion upon employees to join company unions (7 I.J.A. Bull. 86 (1929)). The New York law N.Y.L. 1935, c. 17 makes this clear by specifically referring to "a company union."

On the other hand, in New York closed shop agreements have been held lawful. *Williams v. Quill*, 277 N.Y. 1, 12 N.E. (2d) 547 (1938); see 6 I.J.A. Bull. 147 (1938). The closed shop question was also involved in *Lauf v. Shinner*, 303 U.S. 323 (1938), but was not specifically discussed by the Court. However, in *Wilson & Co. v. Birl*, C.C.H. Lab. Law Serv. ¶18, 304 (D.C. Pa. 1939), Judge Kirkpatrick held that it was immaterial whether under the law of Pennsylvania a strike for a closed shop was legal or illegal. See *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1903), holding a closed shop illegal. He said: "The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object."

⁵⁷ *May's Furs & Ready-to-Wear, Inc. v. Bauer*, 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939). *Contra*, *Bent Steel Sections, Inc. v. Doe*, 170 Misc. 736, 10 N.Y.S. (2d) 920 (1939).

of these laws. Otherwise, the provisions would have no meaning whatever. The argument that they are inapplicable when illegal acts have been performed necessarily supposes that they apply only when the picketing has been entirely peaceful. But then, under the express provisions of these laws, no injunction at all may issue. The effect of the reasoning of the cases we have just discussed is to destroy the statutes completely. Fortunately it has not yet been sanctioned by a court of last resort.

Another phase of this question of "illegality" arises in connection with secondary boycotts. It should be borne in mind, of course, that, even before the modern anti-injunction laws, there was much confusion about boycotts.⁵⁸ The issue arises in a great variety of circumstances. It was first presented to the New York Court of Appeals in *Goldfinger v. Feintuch*.⁵⁹ There the owner of a store who ran his business without any help was being picketed because he sold a non-union made product. The signs the pickets carried were directed against that product; they did not ask the public not to patronize the plaintiff.

The judges were divided.⁶⁰ It is not altogether clear to what extent the various views expressed rested on the statute, to what extent they were merely reflections of earlier common law doctrines. In any case, Judge Finch, who wrote the leading opinion, expressly held that the case involved a labor dispute within the statute. Three of the other six judges concurred with him. Judge Finch appears, however, to have rested his decision that peaceful picketing could not be enjoined rather on the ground that there was "unity of interest" between the manufacturer with whom the union had a grievance and the retailer who was being picketed, than on the statute, and he expressly refused to rule whether the statute did more than re-enact the common law. The decision is further confused because no attempt was made to indicate what facts must be established to show the required "unity of interest."⁶¹ Judge Finch also went out of his way to characterize picketing which was unlawful.⁶²

⁵⁸ Fraenkel, *op. cit. supra* note 6, at 872; Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341 (1938); Lien, *op. cit. supra* note 6, at 606-14. See also cases cited in notes 18, 20 *supra*.

⁵⁹ 276 N.Y. 281, 11 N.E. (2d) 910 (1937).

⁶⁰ Two judges agreed completely with Judge Finch; two agreed with him in all respects, except his approval of the Appellate Division findings of intimidation; two others agreed, but on separate grounds; one agreed as to intimidation, but dissented on the main issue.

⁶¹ Mere sale of non-union goods by the plaintiff has been held enough: *Alexander v. Doe*, N.Y.L.J., p. 857 (Feb. 23, 1939).

⁶² "Picketing is not peaceful where a large crowd gathers in mass formation or there is shouting or the use of loud speakers in front of a picketed place of business, or the sidewalk or entrance is obstructed by parading around in a circle or lying on the sidewalk. Such actions are

It is interesting to observe that Judge Finch did not use the term "secondary boycott" at all; in concurring, Judge Lehman said the facts did not show a "secondary boycott"; Judge Rippey stated that there would have been such a boycott but for the finding of "unity of interest"; and Judge Hubbs, who dissented, held that the facts showed a "secondary boycott" and that such a boycott was illegal.

The same court later decided in *Canepa v. "John Doe"*⁶³ that a "true secondary boycott" had been set forth in the allegations of the complaint in that case and that the complaint stated a cause of action whether or not the case grew out of a "labor dispute" under the statute. The complaint alleged that the plaintiff had purchased a sign which had been constructed and hung by members of a union, that the defendants, members of a rival union, had then picketed the plaintiff's place of business, with placards stating that the plaintiff was unfair to union labor. Presumably the court distinguished the *Goldfinger* case because, in the later case, there was no "unity of interest"—in other words, the plaintiff in that case was engaged, not in selling the product of a manufacturer with whom the union had a dispute, but in using the product. This difference is not mentioned in the very brief *per curiam* opinion; nor is there any indication to what extent the court may have been motivated by the fact that rival unions were involved.

In *Weil & Co. Inc. v. "John Doe"*⁶⁴ a Special Term judge expressly held that no labor dispute existed in a situation identical with that disclosed in the *Canepa* case. He said that there was no unity of interest because the plaintiff did not deal in the signs which were the occasion for the controversy. An injunction against all picketing was granted.

Injunctions have also been granted against picketing advertisers of a newspaper,⁶⁵ against picketing a restaurant which sold union made beer

illegal, and are merely a form of intimidation. Likewise it is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest. Nor is it legal to threaten to ruin the custom and trade generally or to accost or interfere with customers at the entrance to the store. Disorderly conduct, force, violence, or intimidation by pickets should be sternly suppressed by the police and administrative authorities." 276 N.Y. 281, 286, 11 N.E. (2d) 910, 912 (1937).

⁶³ 277 N.Y. 52, 12 N.E. (2d) 790 (1938).

⁶⁴ 168 Misc. 211, 5 N.Y.S. (2d) 559 (1938). To like effect are *Silvergate v. Kirkman*, N.Y.L.J., p. 1976 (April 29, 1939); *American Gas Stations Inc. v. John Doe*, 250 App. Div. 227, 293 N.Y. Supp. 1019 (1937); *Scharf v. John Doe*, 247 App. Div. 882, 288 N.Y. Supp. 895 (1936).

⁶⁵ *B. Gertz, Inc. v. Randau*, 162 Misc. 786, 295 N.Y. Supp. 871 (1937); *Mlle. Reif, Inc. v. Randau*, 166 Misc. 247, 1 N.Y.S. (2d) 515 (1937); but see *Davega-City Radio, Inc. v. Randau*, 166 Misc. 246, 1 N.Y.S. (2d) 514 (1937).

which had been delivered in trucks driven by non-union chauffeurs,⁶⁶ and against picketing a contractor (by property owners) in order to compel the employment of union help in building operations.⁶⁷

In a case involving the hiring of musicians in a dance hall, a temporary injunction was denied because the facts were in doubt: if the musicians were hired by the owner of the hall a labor dispute existed, if they were hired by the dancers themselves, it did not.⁶⁸

Questions concerning the right to picket owner-operated businesses have also arisen. Nothing in the modern laws indicates that an individual running his own business is to be exempt or that an effort on the part of a labor union to organize an entire industry should be blocked by islands of such owner-operators. On the other hand, real hardship may be inflicted by subjecting to picketing a man who has never employed help, merely because a union wants him to do so. Clearly, the situation is one for legislative declaration of policy. But since the legislatures have not considered the problem, it is natural that the courts should attempt a solution.

The New York Court of Appeals was first called upon to decide this issue in *Thompson v. Boekhout*.⁶⁹ There the owner of a motion picture theater had employed a union operator, but after a controversy with the union had discharged him and done the work himself. An injunction was obtained without any attempt to comply with the requirements of the statute. This injunction, it may be noted, permitted silent picketing by one person. The brief *per curiam* opinion said merely that an attempt to induce an owner who attempts to avoid a labor dispute by running his own business to hire others is not a labor dispute under the law. Whatever may be said of the wisdom of such a general rule when applied to one who has never employed help, it is hard to see the justification for it in the particular case that was before the court. How a labor dispute which existed while an employee was being used ceases to be one merely because the employee has been dismissed is hard to understand. It is difficult to conjure up a clearer case of judicial legislation. In the federal courts a contrary rule has been announced.⁷⁰

⁶⁶ *Chapman v. Doe*, 255 App. Div. 893, 7 N.Y.S. (2d) 470 (1938).

⁶⁷ *Muncie Bldg. & Trades Council v. Umberger*, 17 N.E. (2d) 828 (Ind. 1938) (but *contra* where a union of building employees threatened to call a strike of the truck drivers of customers of the owner of property unless the owner required the employment of union help in building operations, *Atlantic Ref. Co. v. Cohn*, 3 L.R.R. 320 (Pa. 1938)).

⁶⁸ *Witoka Civic Ass'n v. Musicians of Greater N.Y.*, N.Y.L.J., p. 1139 (Oct. 15, 1938).

⁶⁹ 273 N.Y. 390, 7 N.E. (2d) 674 (1937). To like effect are: *Simon v. Boris*, N.Y.L.J., p. 364 (Jan. 24, 1939); *Pitter v. Kaminsky*, 7 N.Y.S. (2d) 10 (1938); *Botnick v. Winokur*, 7 N.Y.S. (2d) 6 (1938).

⁷⁰ *Rohde v. Dighton*, 27 F. Supp. 149 (D.C. Mo. 1939).

The principle of the *Thompson* case has been applied to an owner who, instead of running his business himself, elected to discontinue it altogether,⁷¹ to one who conducted the business with his wife, after having discharged his only salesman on the ground that he could not afford to pay union wages,⁷² and even, until reversed on appeal, to the case of a corporation owner, when the work was being done by the principal stockholder and members of his family.⁷³

There have also been cases in which the finding that no labor dispute existed was no more than judicial fiat. Such was the situation disclosed in *People ex rel. Sanders v. Sheriff*.⁷⁴ In utter disregard of procedural and substantive requirements of the New York anti-injunction statute, Judge Fawcett of the New York Supreme Court, sitting in Brooklyn, issued an injunction banning all picketing in an ordinary strike situation. When one, of the strikers was punished for contempt, he challenged the power of the court to issue the injunction by obtaining a writ of habeas corpus from another judge of the same court. The latter sustained the writ, holding the injunction and the contempt commitment both void.

Lower courts in New York have also held that no labor dispute existed in the following variety of circumstances: a hospital was being picketed by employees, on the ground that a hospital was not engaged in "trade" because it was a charitable institution;⁷⁵ certain employees had grievances against their own union;⁷⁶ a dispute arose because of the union's refusal to abide by the terms of a contract, and the only question was the interpretation of an unequivocal written agreement.⁷⁷

The most amazing of the recent New York cases is *May's Furs & Ready-*

⁷¹ *Paul v. Mencher*, 169 Misc. 657, 7 N.Y.S. (2d) 821 (1937) aff'd 254 App. Div. 851, 6 N.Y.S. (2d) 379 (1938) motion to appeal denied, 279 N.Y. 813 (1938); *Wishny v. Jones*, 169 Misc. 459, 8 N.Y.S. (2d) 2 (1938).

⁷² *Bieber v. Bininbaum*, 168 Misc. 943, 6 N.Y.S. (2d) 63 (1938); *Gips v. Osman*, 170 Misc. 53, 9 N.Y.S. (2d) 828 (1939). In the first case the use of false statements was enjoined and peaceful picketing permitted. Cf. *Miller v. Fish Workers Union*, 170 Misc. 713, 11 N.Y.S. (2d) 278 (1939); *contra*, on the ground that the employer was a member of an employers' association, *Schwartz v. Fur Union of Greater New York*, 170 Misc. 566, 11 N.Y.S. (2d) 283 (1939). In *Saito v. Waiters and Waitresses Union*, N.Y.L.J., p. 1676 (April 11, 1939), the Court rejected the contention that the Thompson case was applicable to a case where it was claimed that the employees were members of a partnership.

⁷³ *Boro Park Sanitary Live Poultry Market v. Heller*, N.Y.L.J., p. 962 (Feb. 28, 1939) rev'd, 256 App. Div. 588, 11 N.Y.S. (2d) 164 (1939).

⁷⁴ 164 Misc. 355, 299 N.Y. Supp. 9 (1937).

⁷⁵ *Jewish Hospital v. Doe*, 252 App. Div. 581, 300 N.Y. Supp. 1111 (1937).

⁷⁶ *Trommer v. Brotherhood of Brewery Workers*, 167 Misc. 197, 4 N.Y.S. (2d) 782 (1938).

⁷⁷ *Associated Flour Haulers & Warehousemen, Inc. v. Sullivan*, 168 Misc. 315, 5 N.Y.S. (2d) 982 (1938).

to-Wear, Inc. v. Bauer.⁷⁸ Because the proof showed intimidation and violence the court held that the strikers had become "outlaws" and that the unlawful acts removed the union "beyond the pale and protection" of the statute. And the court upheld the enjoining of all picketing, notwithstanding the statute, on the "inherent power" theory. This theory we shall now scrutinize.

B. THE COURTS ARE SUPERIOR TO THE LEGISLATURE

Although peaceful picketing is permitted by the express terms of the New York law, nevertheless there are many decisions which prohibit it. In part, this has been brought about by declaring that the statute merely embodies the common law,⁷⁹ in part, by stating that the courts have inherent power to issue injunctions which the legislature may not take away.

This contention, that there resides in courts of equity a power no legislature may take away, to enjoin illegal conduct, has resulted in the enjoining of peaceful picketing if the illegal acts committed have been so extensive as to lead to the conclusion that peaceful picketing has become impossible for the future. Such was the reasoning of Judge Cotillo in *Busch Jewelry Co., Inc. v. United Retail Employees' Union*,⁸⁰ a case now on appeal to the Court of Appeals, and of the Appellate Division in *May's Furs & Ready-to-Wear, Inc. v. Bauer*.⁸¹ The argument is usually accompanied by the suggestion that any different construction of the law would be unconstitutional! Yet the doctrine that peaceful picketing may be enjoined if closely tied up with illegal acts is judge-made law,⁸² judge-made due to judges' notions of appropriate public policy. It is the function of the legislature, however, to change the law when its own view of public policy differs from that of the judges. On numerous occasions it has done so and that without successful challenge of its power.⁸³ It is reasonable to suppose that, by barring completely the enjoining of peaceful picketing, the

⁷⁸ 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939).

⁷⁹ See notes 17-27 *supra*.

⁸⁰ 168 Misc. 224, 5 N.Y.S. (2d) 575 (1938) *aff'd* 255 App. Div. 970, 8 N.Y.S. (2d) 819 (1938).

⁸¹ 255 App. Div. 643, 8 N.Y.S. (2d) 819 (1939).

⁸² See *Stillwell Theatre, Inc. v. Kaplan*, 259 N.Y. 405, 182 N.E. 63 (1932); *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690 (1931).

⁸³ See *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E. (2d) 815 (1936); *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E. (2d) 47 (1937) (upholding a destruction of the common law actions of alienation of affection, and breach of promise to marry). See also *Matter of Berkovitz v. Arbib*, 230 N.Y. 261, 130 N.E. 288 (1921), which upheld the legislative overruling of decisions which had denied effect to agreements for the arbitration of future controversies. Cf. N.Y.L. 1893, c. 701, enacted to undo the rule of *Tilden v. Green*, 130 N.Y. 29, 28 N.E. 880 (1891).

legislature intended once more to exercise its great prerogative of disagreeing with the judges. Woe to any democracy in which the judges persist in setting themselves against the legislature!

III. THE NATIONAL LABOR RELATIONS ACT

The growth of administrative agencies has seen a corresponding development of judge-made law.⁸⁴ In part, this has been constitutional,⁸⁵ in part interpretative,⁸⁶ in part it may also be characterized as censorious. For the courts have been quick to use their powers of review in order to set aside administrative findings for alleged lack of evidence sustaining them. This has been done, in spite of legislative declarations that such findings should be conclusive, by invoking the "substantial evidence" rule.

A. THE "SUBSTANTIAL EVIDENCE" RULE

The National Labor Relations Act, Section 10 (e) provides: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."⁸⁷ The provision is not original with the Labor Act. Similar finality had been expressly given to the findings of fact of the Federal Trade Commission,⁸⁸ and by judicial construction to many other administrative agencies.⁸⁹ This finality was given by Congress in the belief that specialists are better able to reach a correct decision on the facts than are reviewing judges.⁹⁰ Yet the courts have thwarted Congressional will in a variety of manners.

⁸⁴ See articles in 47 Yale L.J. 519 (1938); Feller, Administrative Justice, 27 Survey Graphic 494 (1938).

⁸⁵ See *Morgan v. United States*, 298 U.S. 468 (1935) 304 U.S. 1 (1938) and cases cited in notes 91, 92, *infra*.

⁸⁶ See, in this connection, the complaint of the Federal Trade Commission, New York Times, sec. I, p. 8, col. 1 (April 2, 1939). Cf. *Goodyear Tire & Rubber Co. v. F.T.C.*, 101 F. (2d) 620 (C.C.A. 6th 1939). See Legislation, 39 Col. L. Rev. 259 (1939).

⁸⁷ 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938).

⁸⁸ 52 Stat. 1028 (1938), 15 U.S.C.A. § 45 (c) (Supp. 1938).

⁸⁹ This, in the case of the Interstate Commerce Commission, the Board of Tax Appeals, and the Secretary of Agriculture under the Packers and Stockyards Act, resulted from provisions requiring enforcement of orders "regularly made." See 36 Stat. 554 (1910), 49 U.S.C.A. § 16 (2) (1929); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444, footnote 4 (1930). Similar rules have been applied to compensation commissioners, *Voehl v. Indemnity Ins. Co. of North America*, 288 U.S. 162 (1933).

⁹⁰ But see *Hughes, C. J.*, in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 52 (1936): "Some legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." Against this, Brandeis, at 92: "Responsibility is the great developer of men. . . . May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others?"

One attack followed constitutional lines. In *Crowell v. Benson*⁹¹ the majority of the Supreme Court laid down the rule that Congress could not invest any administrative agency with finality in passing on the facts necessary to establish its own jurisdiction. That case arose under the Longshoremen & Harbor Workers Compensation Act; the issue was whether the injured person was an employee of the company proceeded against. The majority of the Court held that that issue was jurisdictional and must be determined by the courts, not, as Congress had intended, by the administrative agency created for that purpose. The same doctrine was soon extended in the *St. Joseph Stockyards* case⁹² to include any issue of constitutional import—in that case, the issue of confiscation. Justice Brandeis dissented; Justices Stone and Cardozo concurred with him.

Just what significance these decisions will have in Labor Board cases remains to be seen. Presumably the courts would not accept as final any Board findings of the facts relating to the interstate commerce nature of the employer's activities. Until now no such findings have been rejected, although in some instances the courts have concluded that the facts as found did not constitute interstate commerce.⁹³ But the extent to which the courts have reviewed the evidence in the leading cases⁹⁴ indicates readiness to reject findings which the judges might consider against the weight of the evidence. If that should happen, there can be no doubt that the will of Congress would be disregarded. The fact that the courts find a constitutional compulsion for such disregard will not seem convincing in the face of Brandeis' analysis in the *Stockyards* case.

Other issues are apparently not jurisdictional. Thus the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Louisville*

⁹¹ 285 U.S. 22 (1932). Justices Brandeis, Stone and Roberts dissented. But for the resignation of Justice Holmes between argument and decision this would probably have been a five-to-four decision. But in *Rochester Telephone Corp. v. United States*, 59 S. Ct. 754 (1939), the Court unanimously refused to weigh the evidence when the issue was whether an intrastate utility was controlled by an interstate one—no contention appears to have been made that this was a "jurisdictional" issue.

⁹² 298 U.S. 38 (1936).

⁹³ *N.L.R.B. v. Idaho-Maryland M. Corp.*, 98 F. (2d) 129 (C.C.A. 9th 1938); *N.L.R.B. v. Faiblat*, 98 F. (2d) 615 (C.C.A. 3d 1939) (awaiting decision by the Supreme Court), criticized in 6 Univ. Chi. L. Rev. 313 (1939).

⁹⁴ See 6 Univ. Chi. L. Rev. 313, 316 (1939). It is uncertain whether, upon proper challenge, there would have to be a trial *de novo* of this issue. See *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 180 (1938). In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937); *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453 (1938); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938), there was no challenge of the findings of fact, but only of the proper inferences of law.

*Refining Co.*⁹⁵ ruled that in reinstatement orders of the Labor Board no constitutional issue is involved which would require an independent review of the facts.

But even where no jurisdictional or constitutional issue was involved, findings by the Labor Board have been rejected for the lack of "substantial evidence" to support them.

The term "substantial evidence" appears first to have been applied in review of administrative agencies⁹⁶ in 1912, when Judge Lamar said that a conclusion of the Interstate Commerce Commission would be sustained if "supported by evidence," but that a mere "scintilla" was not enough, that the courts would "determine whether there was substantial evidence to sustain the order."⁹⁷ The term then found its way into a number of Circuit Court opinions.⁹⁸

Congress, too, has used the term "substantial evidence." The Compensation Act⁹⁹ provides for a presumption that an injury did not result from the employee's wilful intent to hurt himself "in the absence of substantial evidence to the contrary." But this, said the Court, meant no more than had been previously understood, namely, that a finding "must be supported by evidence."¹⁰⁰

The constant use of the term "substantial evidence" by the courts apparently commenced in 1934¹⁰¹ with a statement by the Chief Justice in

⁹⁵ 102 F. (2d) 678 (C.C.A. 6th 1939). See *N.L.R.B. v. Carlisle Lumber Co.*, 99 F. (2d) 533, 538 (C.C.A. 9th 1938). (The court refused to review a finding by the Board that a particular person had been in the company's employ at the time of the Board's order.)

⁹⁶ The rule is, in effect, the same as has been applied to jury cases. The federal courts have consistently held that a case must not be sent to the jury when there is no more than a "scintilla" of evidence, and have rejected the rule that "any" evidence requires such submission. See *B. & O. R. Co. v. Groeger*, 266 U.S. 521, 524 (1925); *Gunning v. Cooley*, 281 U.S. 90, 94 (1930); *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 343 (1933).

⁹⁷ *I.C.C. v. Union Pac. R.*, 222 U.S. 541, 548 (1912). See also *F.T.C. v. Curtis Pub. Co.*, 260 U.S. 568, 580 (1923); *International Shoe Co. v. F.T.C.*, 280 U.S. 291, 299 (1930).

⁹⁸ *Moir v. F.T.C.*, 12 F. (2d) 22, 25 (C.C.A. 1st 1926); *Arkansas Wholesale Grocers' Ass'n v. F.T.C.*, 18 F. (2d) 866 (C.C.A. 8th 1927); *Philip Carey Mfg. Co. v. F.T.C.*, 29 F. (2d) 49, 50 (C.C.A. 6th 1928). In the last of these cases the order was set aside for lack of "substantial evidence."

⁹⁹ 44 Stat. 1436 (1927), 33 U.S.C.A. § 920 (Supp. 1938).

¹⁰⁰ *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

¹⁰¹ Before 1934 the Court used qualifying words other than these when discussing the evidence necessary to support a finding, words such as "adequate," *Zakonaite v. Wolf*, 226 U.S. 272, 274 (1912) (a deportation case), and "sufficient," *F.T.C. v. Pacific Paper Ass'n*, 273 U.S. 52, 63 (1927). But in most of the cases down to 1934 there was no clear statement by the court of the amount of evidence necessary to sustain a finding. *Seaboard Air Line v. United States*, 254 U.S. 57, 62 (1920) (I.C.C.); *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483, 491 (1922); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 442 (1930) (Secretary of Agriculture);

Florida v. United States,¹⁰² a case involving the Interstate Commerce Commission. The same requirement has been applied to the Board of Tax Appeals,¹⁰³ to the Secretary of Agriculture,¹⁰⁴ to the Federal Trade Commission,¹⁰⁵ and to the Labor Board.¹⁰⁶

Whatever one's view may be as to the correctness of this rule,¹⁰⁷ it is evident that the requirement of "substantial evidence" is here to stay.¹⁰⁸ Let us see what it means and how it has been applied. A definition runs as follows: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"¹⁰⁹ and, "It must do more than create a suspicion of the existence of the fact to be established."¹¹⁰

The rule has been applied by the Supreme Court in three Labor Board cases. In the *Consolidated Edison* case,¹¹¹ the majority of the Court found wanting in substantial evidence the holding by the Labor Board that contracts negotiated by the company with an A. F. of L. union had resulted from unfair labor practices of the employer. The Chief Justice reached this conclusion although there was no doubt about the existence of the

Phillips v. Comm'n, 283 U.S. 589, 600 (1931) (Board of Tax Appeals). In unanimously reversing a decision which disregarded the statute giving finality to findings of fact, the Court made no mention of the word "substantial." *F.T.C. v. Algoma L. Co.*, 291 U.S. 67, 73 (1934). Justice Cardozo pointed out that courts could not pick and choose "among uncertain and conflicting inferences."

¹⁰² 292 U.S. 1, 12 (1934).

¹⁰³ *Helvering v. Rankin*, 295 U.S. 123, 131 (1935); see also *Colorado Nat'l Bank v. Comm'r*, 305 U.S. 23 (1938).

¹⁰⁴ *Acker v. United States*, 298 U.S. 426, 431 (1936).

¹⁰⁵ See cases cited in note 98 *supra*. But in *F.T.C. v. Education Society*, 302 U.S. 112, 117 (1937), there was no mention of the word "substantial."

¹⁰⁶ *Washington, V. & M. Coach Co. v. N.L.R.B.*, 301 U.S. 142, 147 (1937); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938); *N.L.R.B. v. Columbian E. & S. Co.*, 59 S. Ct. 501 (1939); *N.L.R.B. v. Sands Mfg. Co.*, 59 S. Ct. 508 (1939).

¹⁰⁷ Learned authority sympathetic to labor has approved it. See Gellhorn and Linfield, *Politics and Labor Relations—N.L.R.B. Procedure*, 39 Col. L. Rev. 339 (1939).

¹⁰⁸ State courts have followed the federal lead. *Massachusetts: Waldorf System Inc. v. L.R. Comm'n*, 4 L.R.R. 137 (1939); *New York: Collier Service Corp. v. Boland*, 167 Misc. 709, 711, 4 N.Y.S. (2d) 480 (1938); *LeMirage Restaurant Co. v. N.Y.S.L.R.B.*, N.Y.L.J., p. 1287 (March 21, 1939); *International Ry. v. Boland*, 169 Misc. 926, 8 N.Y.S. (2d) 643 (1939) (in all but the last cited case the orders were sustained).

¹⁰⁹ *Hughes, C. J.*, in *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

¹¹⁰ *Stone, J.*, in the *Columbian case*, 59 S. Ct. 501 (1939).

¹¹¹ *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938).

unfair practices, largely because he believed insufficient notice had been given of the Board's contention. He said.:

If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers.¹¹²

Justices Black and Reed dissented on the ground that the inferences to be drawn were for the Board, not the courts.

In the *Columbian* case,¹¹³ a strike was in progress at the time the Act went into effect. The employer's refusal to negotiate with the union could not constitute an unfair labor practice, however, since it had occurred before the law was passed. The issue before the Court was whether a later refusal to negotiate at the request of federal conciliators constituted an unfair practice. All the judges agreed that, if the employer had been aware that the union was willing to negotiate, it had violated the law by refusing to do so. At the hearings before the trial examiner it appeared that the union had informed the conciliators of its desire to negotiate, had, indeed, urged them to try to get the employer to meet with them. But there was no express evidence that the conciliators had informed the employer of the union's position. In view, however, of the union's constant desire to negotiate, the Board drew the inference that the employer knew how the union stood. And in this respect the Circuit Court of Appeals sustained the Board.¹¹⁴ Nevertheless, Justice Stone and four of his associates reversed the finding of fact as without substantial support in the evidence. Mr. Justice Black, in a dissent concurred in by Justice Reed, ridiculed the majority's position:

To conclude that the company—through its president—was unaware the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. It is difficult to imagine that—during several hours of conversation between the conciliators and the company's president concerning a future meeting of Union and company—the conciliators refrained from reference to the Union's request that the conciliators arrange such a future meeting. In a realistic view, the com-

¹¹² Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 238 (1938).

¹¹³ Note 106 *supra*; see Gellhorn, *op. cit. supra* note 107, 370 ff.

¹¹⁴ 96 F. (2d) 949, 954 (C.C.A. 7th 1935).

pany's statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union.¹¹⁵

He pointed also to the long standing rule that a finding accepted by the Circuit Court of Appeals would not lightly be set aside by the Supreme Court.¹¹⁶

In the *Sands* case¹¹⁷ the Board found that the company had locked out the men through its hostility to their union. The majority rejected this conclusion as lacking support in the evidence—the word “substantial” is nowhere used in the opinion of Mr. Justice Roberts—because the company had made a contract with that union and was merely seeking to operate in accordance with its terms. The testimony of two employees with regard to hostile statements attributed to a shipping clerk and a superintendent was rejected as amounting to not even a “scintilla” of evidence. In effect, the Court weighed the testimony against the background of the company's previous dealings with the union. It noted also the minor character of the positions held by those to whom the hostile statements were attributed by witnesses.¹¹⁸ Justices Black and Reed again dissented, this time without opinion.

In the lower courts there have been a number of refusals to accept findings of fact made by the Labor Board. Thus, in *National Labor Relations Board v. Lion Shoe Co.*,¹¹⁹ Judge Wilson pointed out that, while common law rules of evidence were not required, “the rules governing reasonable deductions from evidence are not changed.”¹²⁰ In that case the charge was domination of an independent union. The evidence showed this union had arisen after the company threatened to move its plant because it was un-

¹¹⁵ N.L.R.B. v. *Columbian E. & S. Co.*, 59 S. Ct. 501 (1939).

¹¹⁶ Citing *General Pictures v. Electric Co.*, 304 U.S. 175, 178 (1938).

¹¹⁷ N.L.R.B. v. *Sands Mfg. Co.*, 59 S. Ct. 508 (1939); see Gellhorn, *op. cit. supra* note 107, at 372.

¹¹⁸ But Gellhorn, *op. cit. supra* note 107, at 374, questions Justice Roberts' summary of the record and points out that the secretary-treasurer of the company in charge of labor policy was opposed to the union involved.

¹¹⁹ 97 F. (2d) 448 (C.C.A. 1st 1938); N.L.R.B. v. *A. S. Abell Co.*, 97 F. (2d) 951 (C.C.A. 4th 1938). In addition to the cases discussed in the text see *Ballston-Stillwater Knitting Co. v. N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2d 1938); N.L.R.B. v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C.C.A., 9th 1938); *M. & M. Wood Working Co. v. N.L.R.B.*, 101 F. (2d) 938 (C.C.A. 9th 1939), Healy dissenting; *Newport News Shipbuilding and Dry Dock Co. v. N.L.R.B.*, 101 F. (2d) 841 (C.C.A. 4th 1939), Parker dissenting. This is an extreme case in which the majority reversed an order requiring the disestablishment of a representative plan, on the ground that the Board's finding that the employer still dominated that plan lacked substantial support. *Jefferson Electric Co. v. N.L.R.B.*, 102 F. (2d) 949 (C.C.A. 7th 1939).

¹²⁰ N.L.R.B. v. *Lion Shoe Co.*, 97 F. (2d) 448, 452 (C.C.A. 1st 1938).

able to get along with the old union. Yet the Court held that there was no substantial evidence that the employer had been instrumental in bringing the new union into existence. Direct evidence was lacking, and many witnesses testified to the contrary. But it is difficult to accept the Court's conclusion that the Board's inferences were without justification.

In the *Bell* case¹²¹ the Court went even beyond this rule and required not only "substantial evidence," but evidence which would have been competent in a court of law. The Board, Judge Holmes said, might receive hearsay evidence but it could not rest its findings only on such evidence.¹²²

In the state courts there has, until now, been comparatively little litigation. Board decisions were, however, set aside in Pennsylvania in *Matter of Spungin*¹²³ and in New York, in *International Railway v. Boland*.¹²⁴

This growing tendency to reject the findings of these boards may do much to impair their usefulness, especially because no punitive action can be taken against an employer until a court has approved the decision of the board.¹²⁵ The courts seem on the way to nullifying this effort at regulation very much as they have nullified rate regulation.¹²⁶ If so, amendment of the various Labor Relations Laws will be in order, but not in the direction desired by those now vocal in support of such amendment.¹²⁷ Another line of decision, the cases dealing with reinstatements, may also contribute to labor's insistence on amendment.

B. THE EMPLOYER'S RIGHT TO FIRE

The National Labor Relations Act is silent on the circumstances under which the Board may compel an employer to reinstate his employees.¹²⁸ In *National Labor Relations Board v. Jones & Laughlin Steel Corporation* the Supreme Court said that the law "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge

¹²¹ 98 F. (2d) 406, 870 (C.C.A. 5th 1938).

¹²² See discussion of hearsay evidence by Gellhorn, *op. cit. supra* note 107, at 365, 369. See Lien, *op. cit. supra* note 6, at 29-33.

¹²³ 45 Dauphin Co. (Pa.) 145 (1937). ¹²⁴ 169 Misc. 926, 8 N.Y.S. (2d) 643 (1939).

¹²⁵ 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938).

¹²⁶ See Black, dissenting in *McCart v. Indianapolis Water Co.*, 302 U.S. 419, 423 ff. (1938); Brandeis, dissenting in *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n*, 262 U.S. 276, 289 (1923). See also Fraenkel, *Constitutional Issues in the Supreme Court*, 84 U. of Pa. L. Rev. 345, 369, 370 (1936); Hale and Others, *Current Problems in the Public Utility Law*, 38 Col. L. Rev. 959 (1938).

¹²⁷ See 4 L.R.R. 670 ff. (1939); 7 I.J.A. Bull. 73, 85 (1939).

¹²⁸ 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (c) (Supp. 1938), merely gives the Board the power to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."

them."¹²⁹ On the other hand, in that case the Court upheld the Board's power to direct reinstatement because discharges were motivated by intimidation and coercion of workers in their right of self-organization.¹³⁰ The Chief Justice, nevertheless, cautioned against a use of the Board's power where the right of discharge was exercised "for other reasons than such intimidation and coercion."¹³¹ Does this mean that discrimination must be the only reason? Or is it enough if discrimination entered into the discharge even though other reasons also existed? And will the courts review the judgment of the Labor Board on these issues?

There is as yet no authoritative answer to these questions. Thus, in *National Labor Relations Board v. Bell Oil & Gas Co.*,¹³² the Circuit Court rejected a Board finding of discrimination because the evidence showed that the employee was discharged for inefficiency and any evidence to the contrary was only hearsay. In *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*¹³³ a similar result followed, where violation of a rule had resulted in dismissal, because the employer had not dismissed other union members guilty of violating the same rule, and those dismissed had not been active in the union.

In *National Labor Relations Board v. Union Pacific Stages, Inc.*¹³⁴ the issue was more sharply raised since two drivers, discharged for rude conduct, had been active in the union. After examining the evidence in great detail, the Circuit Court concluded that the inference of discrimination made by the Board was unjustified. In reaching its conclusion the Court relied in part on the fact that non-union men were dismissed for similar misconduct and many drivers active in the union were retained. The chief difference between the Court and the Board lay in the significance to be given to the complaints against the dismissed drivers, a significance which depended in large measure on the background of the controversy between the union and the employer. The Court said of the Board's view of this background, that it was incorrectly presented and interpreted and "therefore not to be relied upon." The Court went very far, in this case, toward substituting its own judgment on the facts for that of the Board, although it expressly disclaimed any intention of so doing.

In *Peninsular & Occidental S.S. Co. v. National Labor Relations Board*¹³⁵ certain members of a crew were discharged who had gone on a sit-down

¹²⁹ 301 U.S. 1, 45 (1937).

¹³⁰ The same rule applies to the rehiring of strikers. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

¹³¹ 301 U.S. 1, 46 (1937).

¹³³ 98 F. (2d) 758 (C.C.A. 2d 1938).

¹³² 98 F. (2d) 406, 870 (C.C.A. 5th 1938).

¹³⁴ 99 F. (2d) 153 (C.C.A. 9th 1938).

¹³⁵ 98 F. (2d) 411 (C.C.A. 5th 1938). See 48 Yale L.J. 1067 (1939).

strike because the owner refused to recognize the N.M.U. as a bargaining agency, the men having previously belonged to the I.S.U. with which the owner had a contract. The Board ruled that the discharges were discriminatory, largely because the ship's officers had expressed hostility to the N.M.U. The Circuit Court ruled, however, that it was the officers of the owning company who were the employer, that there had been no proof of discrimination or hostility by them and that the discharges were justified by the need of the service.

Similar decisions were rendered in Wisconsin. In one case the discharge was for absence from work without permission,¹³⁶ in the other, for drunkenness and fighting.¹³⁷ The courts reversed the Board findings in both cases, on the ground that there was insufficient evidence that "the real, actual cause" of the discharge was union activity.

The United States Supreme Court has not yet passed on any of these questions. But it has restricted the power of the Board to direct reinstatement when no issue of discrimination existed and the wrongdoing of the discharged employees was concededly the real reason for their dismissal. In the *Fansteel* case¹³⁸ a group of employees, provoked by the company's hostility toward the union, commenced a sit-down strike. This group was at once discharged and some of its members were not rehired when the plant reopened. The employer refused also to rehire certain strikers who had aided the sit-down strike from the outside; the latter, however, were never formally dismissed. Many of the sit-down strikers were offered re-employment on condition that the union be not recognized, an offer which some accepted. The Labor Board expressly found that no discrimination entered into the rehiring. Nevertheless, the Board ordered the reinstatement of the strikers who had not been taken back, on the ground that it was necessary to restore the condition which existed prior to the employer's wrongdoing so as to effectuate the purposes of the act. The Board contended that it had jurisdiction over both groups of employees because the company was precluded from firing during the continuance of a strike precipitated by its own wrongdoing. For this contention the Board relied on Section 2 (3) of the act,¹³⁹ which defines an "employee" as "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."

The majority of the Supreme Court completely rejected the Board's contentions, except its findings that the employer had been guilty of un-

¹³⁶ *Blum Bros. Box Co. v. Wisconsin L.R.B.*, 229 Wis. 615, 282 N.W. 98 (1938).

¹³⁷ *N. S. Koos Sons Co. v. Wisconsin L.R.B.*, 3 L.R.R. 725 (Wis. 1938).

¹³⁸ *N.L.R.B. v. Fansteel Corp.*, 59 S. Ct. 490 (1939).

¹³⁹ 49 Stat. 450 (1935), 29 U.S.C.A. § 152 (3) (Supp. 1938).

fair labor practices. The Chief Justice ruled, first, that the statute had the effect of preserving an employee's status only beyond the commencement of a strike and not throughout its continuance. An employer, therefore, retained the same right to discharge during a strike as before its commencement, and that right was not forfeited by his own wrongdoing. There can be little quarrel with this interpretation of the statute, in spite of the dissent of Justices Reed and Black. Any other interpretation would deprive the employer of all right to discharge employees after the commencement of any "labor dispute," no matter how grievous the conduct of the employee nor how exemplary that of the employer. The argument of the minority would have had greater force had the statute preserved the employee's rights only when the labor dispute originated from unfair practices by the employer. Actually, however, this question of interpretation is of no consequence in view of the fashion in which the Supreme Court disposed of the other issues in the case.

The Labor Board had argued that, even if these strikers had been properly discharged, it had the power to order their reinstatement to accomplish the purposes of the act. But this, said the majority of the Court, was incorrect, since the employees were guilty of serious wrongdoing. Yet the Chief Justice did not rule that under no circumstances might the Board direct the reinstatement of discharged employees. He was careful to rest his decision on the nature of the acts committed by the strikers in the particular case. Justice Hughes said:

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.¹⁴⁰

¹⁴⁰ 59 S. Ct. 490, 497 (1939).

The Board's argument that the company had not considered these acts as very serious because it offered to rehire most of the men involved was brushed aside with the statement that, once the men had been discharged, the company might do as it liked. The Court, it would seem, failed to perceive the force of the argument. It is directed, not at the rights of the company, but at the propriety of the exercise of discretion by the Board. In other words, how can it be termed an abuse of discretion to restore the parties to the status quo, when the company itself would have been willing to rehire most of the men, had they abandoned their right to demand union recognition?

It is significant that the majority rested its decision on only the supposedly "arbitrary" character of the Board's exercise of its discretion. Yet Mr. Justice Stone concurred with this part of the decision on the ground that the Board had no power whatever to order reinstatement of employees once discharged, except, it may be assumed, when discrimination entered into the discharge. This opinion, if ever adopted by a majority of the Court, will have very serious consequences. Even if an employer were justified in discharging employees for minor offenses on the picket line, why should not the Board have the right to order reinstatement if it was the employer's own misconduct that caused the strike?

Finally the Court eliminated the question of discharges altogether, by treating in the same manner that group of employees which had never been dismissed. Here the power of the Board to act was conceded. Yet the exercise of discretion was set aside by four members of the Court only because of the nature of the wrongdoing by the employees. The latter, it will be remembered, merely aided the sit-downers by bringing in food. Mr. Justice Stone disagreed with this part of the decision, briefly stating that the Court had no right to interfere with the Board's exercise of discretion in a situation where its power to act was established by the statute (Justice Frankfurter did not sit in this case, and Justice Brandeis had retired).

Mr. Justice Reed's opinion does not discuss these issues separately. It rests in part on a construction of the statute, in part on the impropriety of interfering with the Board's discretion. It is regrettable that the dissenters did not take the opportunity more fully to elaborate their views.

The issue of employees' wrongdoing was presented in somewhat different form in the *Carlisle Lumber* case.¹⁴¹ There the Board ordered the reinstatement of employees who had been discharged prior to the effective

¹⁴¹ 94 F. (2d) 138 (C.C.A. 9th 1937) cert. denied 304 U.S. 575 (1938), 99 F. (2d) 533 (C.C.A. 9th 1938) cert. denied 59 S. Ct. 586 (1939).

date of the National Labor Relations Act. Since the strike continued beyond that date, the Court held the strikers still to be employees. Although acts of violence occurred during the strike, none of the employees was discharged for such acts, nor did the company resist the reinstatement of the wrongdoers alone. Instead it resisted the reinstatement of all the strikers, on the ground that the union had not come into court with "clean hands." The Court of Appeals for the Ninth Circuit rejected the argument.¹⁴²

In the *Sands* case¹⁴³ the question of the employer's right to discharge arose somewhat differently. There the strike occurred before the act went into effect; thus it could not be characterized as caused by unfair labor practice. Besides, the employer had previously dealt with the union. The dispute arose over the application of a contract with the union, a dispute in which the employees seem clearly to have been in the wrong. As the union would not allow the plant to be operated except in accordance with its understanding of the contract, the management shut the plant down and later reopened it with men supplied by a different union. The chief basis for complaint against the management was its refusal to bargain collectively with representatives of the original union, after it had made the new contract. Mr. Justice Roberts held that there was no duty on the part of the employer to bargain because, in effect, the original employees had discharged themselves by refusing to work under their contract. Since in this case there was no formal discharge, as there had been of the sit-downers in the *Fansteel* case, it is probable that the original employees would have retained their status down to the time their places had been filled. In other words, had the request for further negotiations come before the making of the contract with the new union, the decision would probably have been different. However, Justice Roberts recognized the right of an employer to discharge employees for "repudiation" of an agreement. It

¹⁴² In the first appeal Judge Haney rested his decision on the ground that it was "not the union but the Board which is asking enforcement" (p. 146); on the second appeal he said, "The penalty is not controlled by equity," (p. 540), citing *National Labor Relations Board v. Remington Rand Inc.*, 94 F. (2d) 862, 872 (C.C.A. 2d 1938), and expressing disagreement with *N.L.R.B. v. Columbian E. & S. Co.*, 96 F. (2d) 948, 953 (C.C.A. 7th 1938). In the first of these cases Judge Learned Hand held that previous misconduct of the union did not bar its right to insist on negotiations when it, in good faith, desired to negotiate; in the second case Judge Evans held equitable maxims applicable to a union which had called a strike in violation of an agreement; in the latter case the Supreme Court affirmed without discussing this subject. See 38 Col. L. Rev. 1507 (1938). A similar contention, that illegal acts by the union deprived it of the right to seek relief, was rejected by the same court in *N.L.R.B. v. Hearst*, 102 F. (2d) 658 (C.C.A. 7th 1939).

¹⁴³ 59 S. Ct. 508 (1939).

may be assumed that the careful choice of this word was intended to indicate that discharge for mere "breach" of a collective bargaining agreement might not be "effective" within the act.

In the *Sands* case, as in the *Fansteel* case, the Court left open the problem which might have been presented had discrimination been established. In the *Sands* case, to be sure, such an issue was involved, but it was not considered by the Court because it had not been properly raised.

It thus appears that the ruling in the *Sands* case was very narrow and that it is not likely to be an important precedent. It recognizes the right of an employer to discharge men who persist in refusing to work in violation of their contract; it approves a refusal to bargain with the representatives of such men after they have been replaced. There is nothing in the opinion which indicates the nature of the Court's decision in a case in which the refusal to work might have been precipitated by an unfair labor practice of the employer.

These decisions, while they have considerably limited the power of the Labor Board, still leave open many important questions. The most far reaching subject is that of discrimination. The prevention of discharges due to union activity remains one of the Board's chief functions. The courts can hamper the Board in its exercise of that function, both by narrow definitions of its powers and by unduly legalistic appraisal of its findings. Their action in these fields will be watched closely by a public increasingly prepared to be wary of the power of judges.

CONCLUSION

There is no specific cure for the evils we have described. Better draftsmanship of laws would improve the situation. But even if the sponsors of reform had the skill and foresight to embody their desires in unmistakable language, it is doubtful whether such laws could be enacted. For often a powerful group of legislators, hostile to labor but unwilling to assume responsibility for the defeat of progressive legislation, frames the laws to contain ambiguities; their hope is that judges will interpret these in the "right" way.¹⁴⁴ It is of the utmost importance, therefore, that sincere and intelligent friends of labor be elected to legislative bodies.

But in the last analysis responsibility rests with the legal profession, in all three of its branches—the teachers, the lawyers, the judges.¹⁴⁵ Men with legal training play a vital part in the drafting of legislation, in its enforcement and in its interpretation; in the last field, in a dual capacity as

¹⁴⁴ See Frankfurter & Greene, *op. cit. supra* note 6, at 139-45.

¹⁴⁵ See Warms, *op. cit. supra* note 6, at 361.

counsel charged with skilful presentation of cases and as judges whose decisions make the law what it is. Today a decidedly progressive training characterizes our great law schools, men like Landis, Clark, Garrison and Rutledge having been heads of important schools. And on the Supreme Court bench we have seen great judges: Holmes¹⁴⁶ and Cardozo,¹⁴⁷ whose luminous judgments have reflected the wisdom of their respective races, and Brandeis,¹⁴⁸ powerful both as advocate and judge in translating the ideal into the actual. The present court, we can be sure, will carry on their tradition. Among the newly appointed judges we have Frankfurter, whose mettle has been proved in many fields¹⁴⁹ and Black, who has already shown a valiant readiness to discard ancient myths.¹⁵⁰ And there are, no doubt, many judges of great capacity in other courts, both state and federal.

Yet it remains inevitable that there should be judges who set themselves up as society's mentors and consider themselves entitled to determine what shall be legal and to pronounce what they believe wise. These men, with the most conscientious motives, destroy statutes either by declaring them unconstitutional as against "natural law," or by emasculating them through interpretation when higher authority has barred the other way. Since they exemplify a persistent type of human thinking and feeling, and since judges are seldom chosen for their psychological qualities, it is foolish to hope that we shall ever be without them.

Therefore, the reformer must be prepared to progress slowly. Often, indeed, he will find that judges send him backward half a pace for every step the legislatures send him ahead. Yet, there *is* forward motion as anyone can testify who was familiar with the state of labor law a brief quarter of a century ago. With persistence and skill we should make even greater strides in this field in the near future. Especially will this be so if the fates give the country judges who are men of good will.

¹⁴⁶ For appraisals of his work see Mr. Justice Holmes (1931) (a collection of articles edited by Frankfurter).

¹⁴⁷ For appraisals of his work see 52 Harv. L. Rev. 353 (1939) (articles by Frankfurter, Corbin and others).

¹⁴⁸ For appraisals of his work see: Mr. Justice Brandeis (1932) (a collection of articles on the occasion of his seventy-fifth birthday, edited by Frankfurter); Mason, Brandeis: Lawyer and Judge in the Modern State (1933).

¹⁴⁹ Among his writings are: The Case of Sacco and Vanzetti (1927); The Commerce Clause under Marshall, Taney and Waite (1937); Mr. Justice Holmes and the Supreme Court (1938); The Business of the Supreme Court (1927) (with J. M. Landis); The Labor Injunction (1930) (with Nathan Greene).

¹⁵⁰ See Fraenkel, Constitutional Issues in the Supreme Court, 1937 Term, 87 U. of Pa. L. Rev. 50, 54-62 (1938); Havighurst, Mr. Justice Black, 1 Nat'l Lawyers Guild Q. 181 (1938).