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# Kentucky's New Employer-Employee Relations Act

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## KENTUCKY'S NEW EMPLOYER-EMPLOYEE RELATIONS ACT

GEORGE NEFF STEVENS\*

Up until June of 1940, if a dispute arose between an employer and employee, in a purely intrastate business or industry, the possibility of a strike or lockout, picketing and boycott, was almost a certainty. The public, regardless of how adversely affected, could do nothing, save look on and hope that an agreement would be reached. Even though one of the parties to the disagreement was most willing to compromise, he could do nothing against an obdurate opponent. Today there is on the statute books of Kentucky a new law, Acts of 1940, c. 105, effective June 12, 1940, providing some relief. This act, entitled Employer-Employee Relations, as originally offered to the legislature was a "little Wagner Act" and a "little Norris-LaGuardia Act" combined. As it stands, it is neither one nor the other. "Unfair" Acts are condemned as against public policy. But, what are unfair acts? The statute does not say. Will the courts have to decide? Where shall they go for guidance? What sort of relief shall they grant when, as, and if they do find "unfair" acts? Unfortunately, an over-zealous legislature pulled the teeth of the "Wagner Act"—they cut out the definitions of what activities should be considered "unfair". With respect to the use of restraining orders in labor disputes, the preamble of the Act shows that the availability of this procedural device was to be seriously curtailed.<sup>1</sup> In the Statute as it stands there is no restriction on the use of the injunction in labor disputes. In fine and eloquent language the statute sets forth the public policy relating to practices affecting employer-employee relations. The right to organize, to strike, to bargain collectively, to engage in peaceful picketing, to assemble collectively for peaceful purposes, are declared to be the law of

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<sup>1</sup> See, "Preamble", Chap. 105, Kentucky Acts 1940, p. 414.

this Commonwealth. It is sufficient to note that each and every one of these provisions is, and was, the law of Kentucky, as found in opinions of the Court of Appeals.<sup>2</sup>

However, this new act does make several important contributions to Kentucky labor law. It does provide for conciliation and mediation in labor disputes. This is a real step forward, and, although the step is but a short one, it may prove to be the start towards better things. A second important change has to do with arbitration as a result of this act. Of this, more later.

As early as 1863 the Court of Appeals of Kentucky held that laborers had the right to organize, to work together to improve their conditions.<sup>3</sup> This was an important victory. But, it did not settle a question which has proved to be a most important source of labor strife—the right of an employer to discharge an employee for union activities. In fact, this right has been since recognized by our Court of Appeals.<sup>4</sup> And so, there has existed, side by side, the right to join a union and the right to discharge for joining a union. Strikes, lockouts and other sorts of labor troubles can be traced directly to these conflicting rights. Recognition of this has been the moving force behind the efforts of those who have devised our machinery for peaceful solution of labor problems. One of these rights must go. The trend has been towards the elimination of the right of an employer to discharge an employee for indulging in his, the employee's, right to join a union. One of the first steps in this direction was formulated during the First World War while the federal government was operating the railroads. General Order No. 8 of the Director General of the railroads provided for the right of self-organization by workers without discrimination.<sup>5</sup> The National Labor Relations Act<sup>6</sup> (N.L.R.A.) represents the extension of this policy of promotion of self-organization and collective bargaining to the much broader and more

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<sup>2</sup> See G. N. Stevens, "The Development of Labor Law in Kentucky" (1940) 28 Kentucky Law Journal 160 *et seq.*

<sup>3</sup> Sayre v. Louisville Union Benevolent Association, 62 Ky. 143 (1863). See also 28 Ky. L. J. 160, 165, *supra* n. 2.

<sup>4</sup> See language in *Saulsberry v. Coopers International Union*, 147 Ky. 170, 143 S. W. 1018 (1912); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S. W. 1079 (1920).

<sup>5</sup> Twentieth Century Fund, Inc., "Labor and the Government," (1935), p. 177.

<sup>6</sup> 49 Stat. at L. 449.

inclusive non-carrier fields. Seven states, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah and Wisconsin, have adopted "little" Wagner Acts.<sup>7</sup> And while the approach to the problem differs in each act, the underlying theory is the same—that peaceful settlement of labor disputes becomes increasingly more difficult, and less probable, if unions are not allowed to organize, free from employer interference, and free from the fear of discharge for exercising a recognized, but heretofore unprotected right.

It is quite apparent from a study of the case law in the industrial states that the mere right to organize, unsupported by legislation actively protecting the right, is almost meaningless. The time factor involved in a court action wherein the union may successfully reaffirm its right is usually sufficient to defeat the union as a practical matter. The weakness of the new Kentucky law lies in that it does not say what shall be deemed unfair acts. In view of the present state of the case law it would seem very unlikely that the court would on its own initiative hold that the employer who discharges for union activity has engaged in an unfair labor practice. The law in that respect was not changed by the statute. The possibility of friction on that score still continues.

However, that is but one of many grounds for labor dispute. If the parties involved get together and settle their difference, the public cares little how they do it. But, where the parties refuse to deal, and where, as a result, not only the parties, but the general public, is affected thereby, a different problem arises. Should the public, through its governmental agencies, intervene? To what extent should it intervene? How to do this? Broadly, the possibilities are these—the creation of a board with power to conciliate, mediate and/or arbitrate in labor disputes.

In the Annual Report of the Secretary of Labor, June 30, 1936, at p. 9, these terms are defined as follows: "Conciliation: Conciliation is an attempt by third party to bring about an amicable solution of the differences involved, but without power to settle them. Mediation: If the workers and the employers agree to submit their disputes to a third party, the procedure is called mediation. Arbitration: When the employers and the

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<sup>7</sup> See collection of such statutes, Smith and De Lancey, "*The State Legislatures and Unionism*" (1940) 38 Mich. L. R. 987, 996.

workers in submitting their disputes to a mediation board also agree to abide by the decision of the board, the procedure is called arbitration.”

As for Conciliation: The Conciliation Service of the Department of Labor is the outstanding example of the successful application of this approach. The Conciliation Service was provided for in the Act of March 4, 1913,<sup>8</sup> which created the Department of Labor. The act authorized the Secretary of Labor to act as mediator in labor disputes and to appoint conciliators. In the Commerce Clearing House, Labor Service,<sup>9</sup> appears the following: “The Conciliation Service attempts to adjust disputes in industries over which the Federal Government has no mandatory jurisdiction. The jurisdiction of the service, unlike that of the Railroad Adjustment Board and the National Mediation Board in interstate carrier controversies, is not exclusive. The Service only intervenes at the request of one of the parties to the dispute or on request of the state authorities. In its adjustment work the Service confines itself to mediation and to the offering of suggestions as to a proper settlement. It is not a board of arbitration and cannot force either party to a dispute to confer with its agents.” The weakness of this machinery lies in this, that the Conciliator has no power to intervene; no power to force the disputants to confer either with its agents or each other; even when requested by one to intervene, he still has no power to force the other disputant to confer. And yet, as we all know, the Conciliation Service of the Department of Labor has achieved a remarkable record of success in the peaceful settlement of labor disputes.<sup>10</sup> A recent notable example was the settlement by a Department Conciliator of the strike at the Vultee Aircraft plant in California. The opponents of this method of approach stress the lack of power to intervene. The proponents stress the fact that here is an agency to which an aggrieved party may turn, but need not.

The new Kentucky labor act adopts this approach in part. It provides “. . . the Commissioner shall have power to act as conciliator and mediator and to appoint conciliators and

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<sup>8</sup> 37 Stat. at L. 736 and 738.

<sup>9</sup> Par. 459.

<sup>10</sup> Jaeger, “Cases and Statutes on Labor Law” (1939) 824—“Conciliation. . . . Of 14,889 disputes handled by the United States Conciliation Service between 1915 and 1936, 11,421 disputes, or over 76%, were satisfactorily adjusted. . . .”

mediators in labor disputes, whenever his intervention is requested by either or both parties to such disputes . . .” And, it goes further, in providing that the Commissioner “may also offer his services as such conciliator and mediator in case any emergency by reason of a labor dispute is found to exist at any time.” But, as under the above federal act, the Commissioner cannot proceed, with any effect, unless both parties accept such conciliation or mediation.<sup>11</sup>

As for Mediation: Legislation creating mediation facilities proceeds upon the assumption that labor and employers will observe more faithfully an agreement for which they have bargained than one which is imposed upon them. The federal government was, here again, the pioneer with respect to the use of this approach to peaceful settlement of labor disputes. Relying on its power to control interstate commerce, and to regulate interstate carriers thereunder, Congress took its first steps towards establishing machinery for the peaceful settlement of labor disputes in the railroad field as a result of the strikes of 1888. This first act was known as the Arbitration Act of 1888.<sup>12</sup> It provided for voluntary arbitration of railroad labor disputes and for investigation by a commission of the cause of any dispute in this field. The act failed in its purpose, for, during the ten years that it remained in effect, the arbitration provision was never utilized, and the investigation provision was used but once, in the Pullman strike of 1894.<sup>13</sup>

The act of 1888 was superseded by the Erdman Act of 1898,<sup>14</sup> which retained and strengthened the arbitration provisions of the Arbitration act, but, as in the earlier act, arbitration remained voluntary. The important addition in the Erdman act was a provision under which the Commissioner of Labor and the Chairman of the Interstate Commerce Commission, upon application of either party to a dispute, was authorized to communicate with the other party to the dispute, and exercise their best efforts, by mediation and conciliation, to get the disputants to settle their difference amicably. And, failing

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<sup>11</sup> Kentucky Statutes (Baldwin, May, 1940) Sec. 1599c-29.

<sup>12</sup> 25 Stat. at L. 501.

<sup>13</sup> See Smith, Cases and other materials on Employer-Employee Relations (1940) 66 *et seq*; Jaeger, Cases and Statutes on Labor Law (1939) 825, footnote 17.

<sup>14</sup> 30 Stat. at L. 424.

this, the federal authorities were to try to persuade the parties to submit to arbitration. This machinery was badly damaged however, when on the first attempt to apply the mediation and conciliation provision, the railroad refused to mediate.<sup>15</sup> But, later attempts to use it were successful, and proved that mediation had greater potentialities than arbitration, as a means of reaching a peaceful solution in a labor controversy. This led to the Newlands Act of 1913,<sup>16</sup> which set up a permanent Board of Mediation and Conciliation. The Board was empowered to offer mediation *on its own initiative*, and, if this proved unsuccessful, was authorized to suggest arbitration. In 1920, the Esch-Cummins Law<sup>17</sup> did away with the principle of mediation, and set up in its place a board upon which would sit representatives of the employer and the employees, who should have the power to pass on disputes in the first instance. The decisions of the board were unsupported by any sanction save public opinion. In *Pennsylvania R.R. Co. v. U.S. Railroad Labor Board*,<sup>18</sup> it was held that the decisions of the Board were binding on neither party. However, in *U.S. v. Railway Employees' Dept. of the A.F. of L.*,<sup>19</sup> an injunction was issued against a strike which was called to protest a decision of the Labor Board reducing wages. The court held that the strike was illegal in that its purpose was to create by this assault a public opinion hostile to the decision of the board.

The Railway Labor Act of 1926<sup>20</sup> incorporated the tested devices of these earlier laws. The policy of mediation was stressed, by the creation of a nonpartisan Board of mediation whose primary duty it was to mediate, and, failing in this, to urge arbitration. Failing in mediation, and failing in obtaining an agreement to arbitrate, the act provided for an emergency board of investigation to be named by the President when recommended by the Board of Mediation, whereupon no strike or change in the terms or conditions of employment could be undertaken until thirty days after the board's report to the President, such report to be made

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<sup>15</sup> See Smith, *supra* footnote 7, at p. 67, quoting from National Mediation Board, First Annual Report (1935), appendix B, p. 60.

<sup>16</sup> 38 Stat. at L. 103.

<sup>17</sup> 41 Stat. at L. 456.

<sup>18</sup> 261 U. S. 72, 67 L. Ed. 536, 43 Sup. Ct. 278 (1923).

<sup>19</sup> 290 Fed. 978 (D. C. N. D. Ill., 1923).

<sup>20</sup> 44 Stat. at L. 577.

within thirty days of the board appointment. Here is the first time that the right to strike is prohibited, even temporarily, in this development. This act even went so far as to put a duty on both employers and employees to make reasonable efforts to make and maintain agreements. However, no penalties were provided for breach of such provision.

Turning to the non-carrier field, your attention is directed to Sec. 13 of the N.L.R.A., which reads as follows: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Thus, out of the carrier field, we find that the federal government has taken a different approach. It attempts in the N.L.R.A. to eliminate strife by making certain practices on the part of the employer, such as interference with union activity, an unfair labor practice and punishable as such. It does encourage collective bargaining, and the Board has, unofficially, acted as mediator, but, under the act there is no such machinery as is found in the railroad legislation. And so, in non-carrier disputes, the federal government falls back on the Conciliation Service of the Labor Department.—Witness the procedure in the Vultee strike, for example.

Such is the picture of mediation on the federal side. The states have also made use of this approach to the peaceful settlement of labor controversies. According to Professor Smith of University of Michigan Law School, "Over one-half of the legislatures have provided for the appointment of mediators invested with the function of aiding the disputing parties to make an amicable settlement. The government official may enter the dispute on his own volition, and, in some states, he may be under a duty to enter a serious dispute. . . . One of his biggest clubs may be the force of public opinion, which he will be required to bring to bear upon the erring party in some states by issuing a report of blameworthiness."<sup>21</sup>

In Michigan, Minnesota and Colorado temporary suspension of the right to strike during a designated period is a part of the mediation program. The government agency, in these states, has, of course, a right and a duty to investigate all labor disputes.

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<sup>21</sup> Smith and De Lancey, *supra* footnote 7, at p. 1023-1024.



In twenty-four states, however, such a limitation on the right of self-help is not imposed. A recent report by Paul N. Herzog, member of the New York State Labor Relations Board, sheds some light on the reason for this variance.<sup>22</sup>

“Government statistics in 1937 disclosed that during recent years well over half the strikes in the State had resulted from the refusal of some employers to recognize an already conceded right—that of their employees to pool their economic strength by joining labor unions. . . . Prior to 1937 employees who felt injured by such action had no recourse but to use the economic weapon of the strike, costly to themselves, their employer and the public alike. Now they need no longer use self-help. The State Labor Relations Act was designed to diminish the use of the strike in this particular type of dispute, by providing a peaceful and orderly alternative through government adjudication.” In a footnote, Mr. Herzog calls attention to *Metropolitan Life Insurance Company v. Boland*,<sup>23</sup> which upheld the constitutionality of the act, as an exercise of the police power.

Turning once again to the new Kentucky labor act, it is apparent that it has failed to clarify, as hereinabove pointed out, what are unfair labor practices. It has, however, stated a public policy in favor of amicable settlement of labor disputes by conciliation, mediation and arbitration, and it has provided for a board of conciliation and mediation which is available on the request of the disputants.<sup>24</sup> Under the statute, the board is authorized to tender its services in a labor dispute. If the parties accept conciliation and mediation the Commissioner “shall have power, in the course of such conciliation and mediation, to hold hearings for the purpose of determining the reason or reasons for such labor dispute and receive the testimony of witnesses under oath; any findings of fact made by him in connection with such hearing shall be reduced to writing and made a public record of . . .” the Department of Labor. And, further, the act provides that where the parties have accepted conciliation and mediation “no strike or lockout shall take place or be put into effect pending the efforts of the Commissioner or his

<sup>22</sup> “*The New York Labor Relations Act in the Development of Administrative Law*” (April, 1940) New York State Bar Association Bulletin, p. 53, 55 *et seq.*

<sup>23</sup> 280 N. Y. 194, 20 N. E. (2d) 390 (1939).

<sup>24</sup> Kentucky Statutes (Baldwin, May, 1940) Sec. 1599c-28.

duly authorized representatives to conciliate and mediate such dispute." This provision against strike or lockout is binding, under the act, for a period of fifteen days from the day of acceptance by the parties of the services of the Commissioner. It may be further extended by mutual consent of the parties.<sup>25</sup> It should be noted that the right of self-help is not taken away by the statute. The statute provides that *if* the parties see fit to accept the services of the Commissioner in attempting to reach an agreement, then they must forego the right of self-help for a period of time during which the Commissioner or his agents will attempt to solve the problem. The weakness of the act, at this point, is all too apparent. The Commissioner can act only when both parties consent; the strike and lockout are restricted only where the parties agree to restrict themselves. It is hardly conceivable that the party at fault in a labor dispute will agree to conciliation and mediation, knowing that the report of the Commissioner is to become a public record. However, time will tell whether or not the statute should be changed. In the interim, we do have a board available for those who honestly disagree and are really interested in settling points of dispute and getting back to work. And, there is the possibility of some pressure on the recalcitrant party through newspaper publicity to the effect that one of the disputants has requested the Commissioner to intervene, but that the other has refused to accept his services.

As for arbitration: Its use might be provided for as a means of achieving peaceful solutions of labor disputes in either of two ways—voluntary arbitration or involuntary arbitration. Provision for voluntary submission to arbitration was made in most of the federal acts above discussed. Unfortunately, the device has not been too popular with either employer or employee. The reason for this lies in the nature of arbitration. At common law and under existing statutes the award of an arbitrator is binding on those who have submitted to it voluntarily.<sup>26</sup> At common law, one could withdraw from the arbitration at any time

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<sup>25</sup> Kentucky Statutes (Baldwin, May, 1940) *supra* footnote 24, Sec. 1599c-29.

<sup>26</sup> *Miller v. Plumbers Supply Co.*, 275 Ky. 647, 122 S. W. (2d) 477 (1938).

prior to entry of an award.<sup>27</sup> Under most statutes, withdrawal is not allowed once the parties have agreed to arbitrate.<sup>28</sup>

The Kentucky Constitution empowers the general assembly to provide for the settlement of "differences" by arbitration.<sup>29</sup> Pursuant thereto the legislature has provided for arbitration by court order<sup>30</sup> and arbitration by written agreement without court order.<sup>31</sup> It should be noted, however, that under these provisions only controversies which are or might be the subject of a cause of action may be submitted to arbitration. As a result, unless amended to cover "differences" broadly, the present statutes are inadequate for many types of labor disputes—such as a strike to procure a collective agreement, or a dispute as to the terms of a proposed agreement.<sup>32</sup>

Arbitration clauses in collective agreements are becoming more and more common. However, their real value, in such cases, turns upon whether or not such agreements are specifically enforceable. Statutes in many states make them so.<sup>33</sup>

There have been no cases before the Kentucky Court of Appeals passing directly on the question as to whether or not an agreement to arbitrate difference arising under a contract is specifically enforceable.<sup>34</sup> However, the new Kentucky labor act appears to have settled this question. The statute provides that "Nothing in this Section shall apply where a joint wage

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<sup>27</sup> Jones v. Jones, 229 Ky. 71, 16 S. W. (2d) 503 (1929).

<sup>28</sup> No Kentucky Cases have discussed this point, so far as I know. But see Smith and De Lancey, *supra* footnote 7, at pages 1025-31, for an excellent collection of statutes and authorities on this point, as it applies to labor cases. See also, case note, (1940) 14 So. Cal. L. Rev. 64.

<sup>29</sup> Ky. Const. Sec. 250.

<sup>30</sup> Kentucky Code (Carroll, 1938) Sec. 451.

<sup>31</sup> Kentucky Statutes (Carroll, 1938) Sec. 69-72.

<sup>32</sup> In *In re Buffalo & Erie Railway Co.*, 250 N. Y. 275, 165 N. E. 291 (1929), the court refused to appoint arbitrators where the purpose of the arbitration purported to be to fix terms of a proposed agreement. But, the court did suggest that, perhaps, legislation could make voluntary agreements to arbitrate such questions specifically enforceable.

<sup>33</sup> See statutes and cases, cited in Walsh on Equity (1930), p. 326-327; Cook, Cases on Equity (1932) p. 541, footnote 18.

<sup>34</sup> Such a problem should not be confused with whether or not an award under an arbitration agreement is specifically enforceable. On this latter point, whether or not specific performance will be granted depends upon what the award involves. Thus, in *Pawling v. Jackman*, 16 Ky. 1 (1795), specific performance of an award to convey land will lie, and in *Turpin v. Banton*, 3 Ky. 32 (1808), specific performance of an award to pay a sum of money will not lie.

agreement now exists or may hereafter exist in any industry which by its terms and provisions provides for settlement of disputes. Any dispute which may arise shall be settled by the terms and provisions of said contract."<sup>35</sup> This becomes apparent when read in the light of the provision with respect to public policy, that "Peaceful and amicable conciliation, mediation and arbitration of disputes between employees should be, and hereby is declared to be the public policy of this Commonwealth,"<sup>36</sup> and the provision that "When used in this Act, unless the context otherwise expressly provides, . . . (d) 'Shall' is mandatory, . . ."<sup>37</sup> As a result, agreements to settle disputes arising out of collective agreements by arbitration are specifically enforceable.

With respect to involuntary arbitration, that is, compulsory or forced arbitration of any or all disputes, regardless of consent, it would seem sufficient to point out that a provision in the Kansas Industrial Act<sup>38</sup> to this effect was declared unconstitutional, when applied to regulation of wages and hours, by the Supreme Court of the United State in *Wolff Packing Co. v. Court of Industrial Relations*.<sup>39</sup> As the Supreme Court said in its opinion: "The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. . . . Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment." Such a procedure as involuntary arbitration has no place in our economic, social and political system.

In conclusion, it seems clear that the new Employer-Employee Relations Act is indicative of progress. Whether slower than some would have it, or faster than some think safe, we have moved forward. That, in itself, is most encouraging.

<sup>35</sup> Kentucky Statutes (Baldwin May, 1940) Sec. 1599c-29.

<sup>36</sup> Kentucky Statutes (Baldwin, May, 1940) *supra* footnote 35, Sec. 1599c-28.

<sup>37</sup> Baldwin's *supra* footnote 28, Sec. 1599c-4.

<sup>38</sup> Kan. Gen. Stat. (1915) Sec. 44-601 *et seq.*

<sup>39</sup> 262 U. S. 522, 43 Sup. Ct. 630 (1923); 267 U. S. 552, 45 Sup. Ct. 441 (1925).