



Volume 52 | Issue 3

Article 4

June 1950

Government by Injunction

Charles E. Mahan

West Virginia Bar Association

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Administrative Law Commons](#)

Recommended Citation

Charles E. Mahan, *Government by Injunction*, 52 W. Va. L. Rev. (1950).

Available at: <https://researchrepository.wvu.edu/wvlr/vol52/iss3/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

GOVERNMENT BY INJUNCTION?*

CHARLES E. MAHAN**

In trying to select some subject of public moment which may be of interest to you, I propose to talk briefly about "government by injunction", and will ask that you particularly remember that there is a question mark after this title. In the newspapers, periodicals and business conversations of the day, we hear of government by injunction so often that it may be well to inquire whether or not such a charge is well founded.

It is true that there is considerable potential dynamite in the subject, but let me now assure you that every reasonable effort has been made and will be made to avoid its political and class ramifications, and so far as I am able, I will attempt to show no bias or prejudice. "Government by injunction" imports the administration and enforcement of the law by judicial decree rather than by the legally constituted executive and administrative officials.

No other branch of the law has become more vital or dominant than that of labor relations, for in its broader sense it encompasses practically all of the economic phases of human relations. Therefore, early and throughout your practice of the law, it will be a subject which requires your almost daily consideration.

It is an important branch of corporate and business law and, in this connection, I would like to quote to you from an address by William T. Gossett, General Counsel of the Ford Motor Company, made at the Inter-American Bar Association meeting of May 24, 1949, as follows:

"The lawyer representing business today, if he is to live up to the challenge of his new responsibilities, will endeavor to avoid the errors of the past; he will shun the kind of advice which is motivated by a desire to preserve the *rubrics* of a vanished era; he will be alive to the social, economic and political implications of the times; he will avoid a narrow, shortsighted approach to his clients' problems; he will act with due regard for the social responsibilities of the enterprise; he will have the courage to advise against a business program or device which, although legally defensible, is in conflict with the basic principles of ethics. *Failing* this, he not only will be

*Annual address of the President of the West Virginia Bar Association to the Student Body of the College of Law, West Virginia University, delivered on March 27, 1950.

**President of the West Virginia Bar Association, 1950; member of the Fayette County bar.

ignoring his obligations to society, he will be doing a disservice to his client, who may find himself in the position of winning a *legal battle* but losing a *social war*."¹

With this preamble, the "issue" of the moment will be limited to a discussion of certain phases of injunctive relief, authorized under the National Labor Relations Act, and more particularly the amendments and additions of 1947 officially designated as the Labor-Management Relations Act and, commonly known as the Taft-Hartley Bill, which latter has been vicariously referred to as the "slave labor law", or "industry's Magna Charta", depending on the point of view.

Those parts of the law which are alleged by some to have revived "government by injunction" are principally found now in sections 160 and 178 of Title 29, of the United States Code Annotated, affording injunctive relief on two broad but distinct bases, first, for the protection of the national health and safety, second, for the prevention of certain "unfair labor practices", defined and prohibited therein.

In the first instance, it is provided in substance that where a strike or lockout affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission or communications among the several states or with foreign nations, or engaged in the production of goods for commerce; and, if permitted to occur or continue will imperil the national health or safety, then, after a board of inquiry shall have been appointed and made its report at the instance of the President, the Attorney General, at the President's direction, shall petition the United States court having jurisdiction to enjoin such strike or lockout or its continuance.

However, it is further provided by the act that such an injunction, if granted, is limited in its scope and duration. It is solely for the purpose of protecting the national health and safety and cannot be used by individuals or for the protection or preservation of private rights or property, circumscribed as it is by other provisions of the act, among which are:

(1) The United States only may apply for and obtain such an injunction.

(2) Such injunction may not be permanent but is limited in duration not to exceed eighty days, during which voluntary collective bargaining must be continued.

¹ 54 CASE & COMMENT (Nov.-Dec. 1949) 56, 59.

(3) At the end of that "cooling off" period, the injunction must be dissolved and the negotiating parties left to their original rights, which presumably have been or are being settled through the process of the National Labor Relations Board and other federal conciliation services.

Labor's principal complaint against these injunctive provisions of the act is that thereby the government compels persons to work upon terms of employment which not it, but the private employer, has fixed and which the government has no power to alter. From this flows the charge of the unions that it is a "slave labor law."

However, in the past two and one half years, the United States has been compelled to and reluctantly has invoked these injunctive provisions eight times, with varying results, mostly good.

It must be borne in mind that where a strike, either *malum prohibitum* or *malum per se*, is enjoined, it is not the quitting of work which is attacked but it is the concerted suspension of employment which is the gravamen of the charge, upon which the relief is based. In other words, it is the use of the strike weapon as an instrumentality of an illegal combination,² which is actionable.

In emphasis of this distinction, there has been preserved in the present Labor-Management Relations Act of 1947, that part of the original National Labor Relations Act of 1935, which, in connection with unfair labor practices, specifically provided and still provides that nothing in the law shall be so construed as to interfere with, diminish or impede the right to strike.³ Section 502⁴ of the new law specifically provides that nothing in the act shall be so construed as to make a quitting of work by an individual employee an illegal act, and prohibits any court from compelling any such employee to labor or serve, without his full consent. Again it is emphasized that there is preserved to the individual full freedom of action, and it is only the illegal combination or conspiracy against which the injunctive relief may be directed.

As heretofore stated, the other injunctive features of the new labor law, apart from those affecting the national health and safety are not materially different from those which were contained in the original Wagner Act of 1935, and relate primarily to the judicial prevention of unfair labor practices as defined therein. One of the great changes brought about by the 1947 act was that

² *Dorchy v. Kansas*, 272 U. S. 306 (1926).

³ 29 U. S. C. A. §163 (1947).

⁴ *Id.* at §15.

prior thereto, there were only prohibited certain acts of management or the employer which were recited as being "unfair". This section⁵ was substantially amended and broadened by defining and prohibiting six separate and distinct acts or practices which would constitute unfairness on the part of a labor organization or its agents. Many of these were related to or corresponded with the five previously defined and prohibited unfair labor practices on the part of the employer.

All unfair labor practices of both management and labor may now be enjoined in the federal courts by the labor board itself and upon its findings and orders, provided such action receives the authority and approval of the office of general counsel, which was created by the 1947 Act.⁶ It is again significant to note that these procedures are not available, of right, to management or labor individually, or to their organizations, but only as the board and its general counsel may see fit to act, upon complaints duly made and processed.

It was not until the Taft-Hartley Act recognized that labor and its organizations, as well as management, might conceivably be guilty of "unfair labor practices" and added the national emergency provisions, which have been referred to, that we began again to hear of "government by injunction". Under the 1947 act, certain forms of picketing may be illegal, as constituting unfair labor practices. Injunctions against picketing have within the past few years intensified the long existent judicial conflict as to whether by them are violated the constitutional guarantees of freedom of speech and freedom of assembly. On these questions, the decisions of the courts are by no means uniform,⁷ but the more recent trend appears to justify such injunctions, in part upon the theory of an unlawful conspiracy and in part in the furtherance of a statutorily formulated national policy.⁸

The implications of the very words "government by injunction" are obnoxious to the American concepts of freedom and a government "of, by and for the people." Particularly are we lawyers anxious to conserve and preserve the constitutional liberties, as we see them. We are, in a sense, the voluntary sentinels guarding against too much of an encroachment by what may be

⁵ 29 U. S. C. A. §158 (Supp. 1949).

⁶ *Id.* at §153.

⁷ *A. F. of L. v. Swing*, 312 U. S. 321 (1941); *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722 (1942).

⁸ 1 LAB. LAW J. 3 (1949).

termed the "common good", or "the welfare state" upon the inherent and inalienable rights of the individual. Yet it is no less our duty to recognize that an ever expanding and progressing civilization creates new problems and complexities, which require changes in the laws and their applications to humanity and to its labor relations.

A brief historical background of how and when "government by injunction" was conceived and its vicissitudes during the intervening years, is essential to our present understanding of it, and will be outlined briefly.

The *Debs* Case was brought to the United States Supreme Court in 1895,⁹ involving an injunction in the famous Midwest Railroad strike of that period, and the right of injunctive relief was sustained. Injunctions in labor cases antedated that decision but had not yet attracted national attention. In the *Debs*, as well as in such earlier cases, criminal conspiracy afforded the customary legal sanctions against labor unions and their activities. In the 1896 national platform, one of the major political parties declared against "government by injunction". It is contended by many, although ordinarily less than a majority in recent years, that such party continues so to declare.

In 1908, in the *Danbury Hatters* case,¹⁰ the same Court held that the Sherman Anti-Trust law, which had been on the federal statute books for several years, applied not only to business restraints but to union activities as well.

Against both of these decisional doctrines organized labor rebelled, and many union leaders created among their following an antipathy towards the courts, which was to continue for many years. Through the Clayton Anti-Trust law of 1914¹¹ labor activities became unenjoinable if (1) carried on for a lawful purpose, and (2) in connection with a controversy between the employer and his employees. This was labor's first significant legislative victory.

In 1917, the United States Supreme Court decided in the *Hitchman* case,¹² which arose from West Virginia, that a court of equity could issue an injunction restraining attempts to organize employees who were bound by a contract with their employer not to join a labor union. This was a body blow to union organization

⁹ *In re Debs*, 158 U. S. 564 (1895).

¹⁰ *Loewe v. Lawlor*, 208 U. S. 274 (1908).

¹¹ 38 STAT. 730 (1914); 29 U. S. C. A. §52 (1947).

¹² *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1916).

in new areas and new industries. The use of so-called "yellow dog contracts" and injunctions to prohibit their violation became increasingly prevalent. I recall sitting in the gallery of the United States Senate Chamber more than twenty years ago when that august body refused to confirm the nomination of Judge John J. Parker of North Carolina as a justice of the Supreme Court, principally on the ground that at one time he was credited with having affirmed on appeal a "yellow dog injunction." In like manner, there was afforded a political graveyard to many an eminent jurist of that and the following eras.

The Clayton Act had failed to fulfill the high hopes of labor for it and for almost two decades organizational activities languished and the ranks of organized labor were gradually depleted, reaching an all time percentage low in the first years of the depression of the early 30's. From more than five million members in 1920, the ranks were reduced to less than three million in 1933.¹³

The genesis of labor's resurrection was the Norris-La Guardia Anti-Injunction Act, passed March 23, 1932,¹⁴ whereby the so-called "yellow dog contract" was declared against public policy and void; the courts of the United States were barred from issuing injunctions in almost every form of controversy arising from a labor dispute and all public policy favorable to union organization and collective bargaining was thereby declared.

However, the continuance of the depression dimmed the brilliance of this legislative victory of organized labor and, with the aid of economic compulsion, industry soon learned to combat organizational activities by interference of various kinds, including the discharge of union "agitators" and the refusal to bargain.

It was then that the NRA provided for a code of fair competition and the "blue eagle", piloted by General Hugh Johnson, spread its wings and provided a panacea for all of labor's ills, either real or fancied. The pendulum began to swing quite farther to the left.

Again the burden fell upon the courts, upon which most labor leaders of the generation already looked with suspicion and disfavor, to hold the National Recovery Act unconstitutional, and the "dead chicken" case¹⁵ became national history. It was thereby held that extraordinary conditions do not create or enlarge con-

¹³ 22 ENCYC. BRIT. 384.

¹⁴ 29 U. S. C. A. §§101-115 (1947).

¹⁵ Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

stitutional powers of the government. The influences of this decision were far reaching and permanent.

To take the place of the blue eagle, there was proposed by Senator Robert Wagner of New York, and enacted by an overwhelming majority in both branches of Congress, the National Labor Relations Act of 1935, which popularly bears the name of the "Wagner Act." By this, the labor injunction, as such, was abolished, not regulated. It expressed the policy that labor unions should grow, without setting forth conditions under which the growth should take place. It left the government without a bilateral policy governing labor-management relations. No order could be entered nor enforcement provided against labor unions and their agents, but the act was addressed solely against the employer's wrongdoing.

From these conditions so created, it was inevitable that the Taft Hartley Act, or some other similar legislation, should eventually emerge. It was the natural outgrowth of this evolution. Though probably loosely drawn in many respects, and admittedly subject to further proper amendment, the Taft-Hartley Act expressed the objective of equating rights with liabilities.

The Taft-Hartley Act¹⁶ integrated itself with the Wagner Act and constitutes our national labor relations law, and shall so remain, until and unless the eighty-first or some future congress decrees otherwise. And like Aesop's fable of long ago, congress has tried to please everyone, has pleased no one, and apparently "lost its ass in the bargain."¹⁷

Time and space will not permit discussion of other statutes and decisions affecting labor but not bearing directly upon the present subject.

Let me again call to your attention that the federal legislation with respect to injunctions as herein commented upon, is and must be predicated upon and limited by the "commerce" powers and provisions of the United States Constitution. However, under the long continued and persistent trend of legislative declarations of policy with respect to labor and high court decisions construing them, which have been prevalent during the last decade or more, it is now difficult to conceive any substantial economic activity, which is not either "in commerce" or which "affects commerce".

¹⁶ 29 U. S. C. A. §151 *et seq.* (1947).

¹⁷ 1 AESOP, THE MAN, THE DONKEY AND THE BOY (620-560 B.C.).

However, the United States is not limited in its right to injunctive relief in matters of commerce only, as was typified in the case of the *United Mine Workers of America*,¹⁸ decided in March, 1947, more than three months before the Taft-Hartley amendment became effective. In that case the government had seized the coal mines under the War Labor Disputes Act of 1943,¹⁹ and a temporary injunction was awarded against the union and John L. Lewis, its president, to inhibit a work cessation or "strike". The Court held that since the Norris Act, which is often popularly known as the Norris-LaGuardia Act, did not specifically exclude the United States from injunctions in labor disputes, therefore the Federal Government had the inherent right to prevent the stoppage of production "for the War Effort and for the continued operation of the national economy during the transition from war to peace." The Court seemed to strain considerably at the philosophy of the United States compelling its citizens to work for the private profit of the coal operators, but justified its decision on the grounds that, under its seizure, the miners were in fact employees of the government, under a form of conscription, which had been provided by the War Labor Disputes Act.

Be that as it may, the Taft-Hartley Act soon thereafter enacted, can be and has been used to compel labor for private profit or, at least for a period of eighty days, profitable or not, upon terms and conditions in existence between the employer and the employee at the time of its issuance. Judge Goldsborough held that an injunction under such circumstances was neither a denial of "freedom of speech" nor a requirement of "involuntary servitude."²⁰

In addition and in clarification of previously existing statutes, as construed by this last mentioned decision, Section 305²¹ of the subject act specifically provides that it shall be unlawful for any employee of the United States or any agency thereof to "participate in any strike". So swings the pendulum—this time to the right.

Before embarking on other branches of this subject, brief comment will be made on the last injunction sought and obtained by the United States under the public welfare provisions of the Taft-Hartley Act. Rather belatedly, the injunction was applied for and granted against the continuance of the recent coal strike, on

¹⁸ *United States v. United Mine Workers of America*, 330 U. S. 258 (1947).

¹⁹ 50 U. S. C. A. §1503 *et seq.* (1944).

²⁰ *United States v. International Union, U. M. W. A.*, 77 F. Supp. 563 (Dist. Col. 1948).

²¹ 29 U. S. C. A. §188 (1947).

the grounds that the health and safety of the American people were in jeopardy. Unfortunately, either through design or political expediency, the government was unable either to compel compliance with the mandate of its court or to punish for contempt those who violated it.

Constitutional questions most often raised in this class of cases, other than those involving commerce, are "freedom of speech," "freedom of assembly," "involuntary servitude" and the "due process" clause of the Fourteenth Amendment.

In the *Debs* case, as well as in subsequent cases,²² the Supreme Court held that federal judges have the power not only to enjoin violent strikes and picketing activities, but also to regulate them, as by defining the permissible number of pickets and the manner in which picketing may be carried on.²³ The *Meadowmoor Dairies* case arose on appeal to the United States Supreme Court from the state court of last resort of Illinois on federal constitutional questions, and it was there held that the use of injunctions to restrain violence in the course of a labor dispute, did not violate the Fourteenth Amendment to the United States Constitution. Of course the Norris Act was not applicable, as it could regulate only the jurisdiction of the federal courts.

Many of our states have statutes, most of which were passed in recent years, regulating, curbing and prohibiting wrongful acts of labor unions and their members. At common law and by virtue of statutes in certain states, combinations and conspiracies or other concerted efforts to damage or injure persons, property or rights, by force, violence, threats, coercion or other illegal or wrongful means, may be restrained by injunction, whether the injury is actual or merely threatened. West Virginia has no such statutes, except those relating to conspiracy under the so-called "Red Men's Act"²⁴ which the supreme court of this state has held was a statute against "wilful trespass".²⁵

After the Clayton Act and before the Norris Act, the United States Supreme Court upheld the right of the immortal Judge McClintic, of the southern district of West Virginia, in the *Red Jacket* case,²⁶ to enjoin a conspiracy of the United Mine Workers

²² *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921).

²³ *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

²⁴ W. Va. Acts 1882 c. 135, W. VA. CODE c. 61, art. 6, §7 (Michie, 1949).

²⁵ *State v. Porter*, 25 W. Va. 685, 689 (1885).

²⁶ *International Organization, U. M. W. A. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Circ. 1927), *cert. denied*, 275 U. S. 536 (1931).

Union to "strike" the mines of nonunion operators in southern West Virginia, as being in restraint of trade between the states. This decision was in affirmation of a previous fourth circuit court of appeals decision from the northern district of West Virginia, wherein it was held that such injunctive relief was not dependent upon public disorder or threatened violence, the emphasis being placed on the disruption of commerce.²⁷ These decisions followed the pattern in the previously referred to *Hitchman* case. However, the famous later *Hutcheson* case,²⁸ bottomed on the Norris-La Guardia Act, held unequivocally that labor union activities were exempt from monopoly and anti-trust laws, thereby materially limiting the field on injunctive relief in the federal courts.

Time and space will not permit a discussion of the evolution of injunctions in labor disputes in the state courts of West Virginia. It may be generally said that such courts have rather consistently, although at times reluctantly, inhibited conspiracies and combinations, which were held formed for an unlawful or a wrongful purpose, or, which lawful in their inception and purpose, had resulted in trespasses to or invasion of persons, property or rights, contractual or otherwise. Typical are restraining orders against restraint of trade, contractual violations, threats or coercion, in union activities or for the furtherance of union purposes. These cases often arise where a union has attempted to organize a nonunion plant or industry, or has attempted to prevent work at a plant or in an industry where a strike is in progress. They predominantly result from various forms of picketing.

The trend in this state may be illustrated by a comparison of the West Virginia decision of *Parker Paint & Wall Paper Co. v. Local Union No. 813* in 1921, which held that a union and its members who conspire to induce others to break a valid contract with third persons, may be enjoined, if the loss occasioned thereby is substantial, continuous and irreparable,²⁹ and *Blossom Dairy Co. v. International Brotherhood of Teamsters*, decided in 1942, which held that picketing will not be enjoined on the ground that it tends or is intended to cause a breach of a valid contract with others, when such picketing is otherwise lawful.³⁰ In the later case a distinction that the former involved acts of violence was drawn

²⁷ *Bittner v. West Virginia-Pgh. Coal Co.*, 15 F.2d 652 (4th Circ. 1926).

²⁸ *United States v. Hutcheson*, 312 U. S. 219 (1941).

²⁹ 87 W. Va. 631, 105 S. E. 911 (1921).

³⁰ 125 W. Va. 165, 23 S. E.2d 645 (1942).

but was certainly not convincing from a reading of the two decisions. Perhaps the real distinctions more nearly lay in an ever changing economic and political philosophy.

In many of the earlier West Virginia decisions, it appears that union or labor organizations, as such, were restrained without question. A milestone was reached in the 1944 decision of *Milam v. Settle*, which, although it involved an action of trespass for damages, held unequivocally that a union or labor association has no legal existence and cannot be sued in any form of action or proceeding³¹ This decision apparently will not affect, one way or another, injunctive rights against union members individually or others acting in concert or conspiracy.

Again let me emphasize that I have only tried to deal with one of the many phases of the National Labor Relations Act as amended and added to by the Taft-Hartley Act.³² Only the fringes and skeleton background of "government by injunction" have been outlined in this limited time.

However, if, by reason of this discussion, any interest has been aroused in tomorrow's members of our legal profession, awakening them in a measure to the challenge of their economic and social responsibilities in the practice of law, your time and mine will have been worthwhile.

Although government by judicial fiat was not intended by the framers of our Constitution, we lawyers still hope and believe that our judiciary is the bulwark of our constitutional government and is more immune to political pressure and mass or class compulsion than other branches of the government. Only by the continuous and continued integrity and vigilance of our judicial system can we, in truth, "equate rights with liabilities" in management-labor relations.

A unilateral government policy, either for or against labor, capital or other class or creed, is dangerous and strikes at the very foundation of constitutional government. When labor, organized on an industry-wide national basis, can successfully defy the government, in its apparent effort to protect the public health and safety, it is challenge to us lawyers, which we cannot conscientiously ignore.

³¹ 127 W. Va. 271, 32 S. E.2d 269 (1944); 1947 W. VA. BAR ASS'N REP. 110.

³² 1948 W. VA. BAR ASS'N REP. 18.