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LABOR LAW - NATIONAL LABOR RELATIONS ACT - JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

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LABOR LAW — NATIONAL LABOR RELATIONS ACT — JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD — Respondent, employing about sixty persons, was the sole owner of a garment-tailoring concern in New Jersey. His only business was with the Lee Company, a New York firm, that sold finished goods. There was no financial affiliation between them. The Lee Company purchased the cloth and caused it to be delivered to respondent. Respondent tailored it and delivered the finished product to a representative of the Lee Company at respondent's plant. This representative sent it back to New York in Lee Company trucks. Title to the cloth remained throughout in the Lee Company. *Held*, Justices McReynolds and Butler dissenting, and Justice Frankfurter taking no part, that the National Labor Relations Board had jurisdiction of respondent. *National Labor Relations Board v. Fainblatt*, (U. S. 1939) 59 S. Ct. 668, reversing (C. C. A. 3d, 1938) 98 F. (2d) 615.

The general problem of the National Labor Relations Board's jurisdiction is the subject of a comment appearing in a recent issue of this *Review*.[1] As stated by the Supreme Court, the applicability of the Wagner Act[2] to a business which, in the light of past definitions of interstate commerce, is "local,"[3] depends upon whether it has a "close and substantial" relation to such commerce.[4] The Court in the *Jones & Laughlin* case refused to pigeon-hole fact situations, and returned to the broad doctrine of the *Ogden* case,[5] holding "It is the effect upon commerce, not the source of the injury, which is the criterion,"[6] a doctrine frequently applied by the Court in other situations.[7]

[1] 37 MICH. L. REV. 934 (1939).

[2] 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. IV, 1938), § 151.

[3] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935); Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936).

[4] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 37, 57 S. Ct. 615 at 624 (1937).

[5] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824).

[6] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 32, 57 S. Ct. 615 at 622 (1937).

[7] Its application is most easily apparent in the "stream of commerce" cases typified by Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922), and Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923). It can also be traced into the cases upholding federal regulation of intrastate agencies of transportation where they directly affect interstate commerce [e.g., Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 42 S. Ct. 232 (1922)] and anti-trust cases involving federal regulation of trade unions in their relations to intrastate employers where union activities directly affect interstate commerce [Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551 (1925)]. The National Industrial Recovery Act and the Guffy Coal Act were attempted extensions of this doctrine, and were stricken down as attempts to regulate intrastate marketing and production in Schechter

In attempting to give meaning to this broad test in the labor field several questions suggest themselves. Does "substantial" require that the business sought to be regulated include a large portion of the particular industry? The *Friedman* case answers this in the negative, for the Friedman Company produced only one-half of one per cent of the industry's total production.[8] Does "close" mean that a substantial portion of the business of the unit sought to be regulated must itself be interstate commerce? In the *Jones & Laughlin* case it is intimated that enterprises to be subject to the act must make their "relation to interstate commerce the dominant factor in their activities," [9] but no arbitrary percentage is required.[10] It has been deemed unnecessary to show that a labor dispute will diminish interstate commerce in the entire trade, and any such requirement would prevent the attainment of the purposes of the act. Decisions to date also indicate that the device of local passage of title to goods sold to non-residents does not necessarily preclude the board's jurisdiction.[11] Nor is it necessary that a sale be involved. Where materials are sent across state lines from one company plant to another, interstate commerce is clearly involved though there be no

Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935), and Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936), respectively.

[8] National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58 at 87, 57 S. Ct. 615 at 634 (1937) (dissenting opinion).

[9] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 41, 57 S. Ct. 615 at 626 (1937).

[10] National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9th, 1937) 91 F. (2d) 790. Here jurisdiction was upheld where there were no "imports" and but 37% of the product was sold in interstate commerce.

[11] Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656 (1938), decided that the fact that goods are sold f.o.b. the factory, title passing at the factory, is immaterial on the issue of jurisdiction. Where the situation is complicated by the intervention of a jobber between the firm sought to be regulated and the ultimate consumer, different results might be reached (1) where the jobber purchases goods from the firm, sends them to a warehouse within the state, and fills his orders out of the warehouse, and (2) where the jobber relays his orders to the manufacturer who, although he is paid by the jobber, ships directly to the ultimate consumer. On facts comparable to situation (1) the court in National Labor Relations Board v. Idaho-Maryland Mines Corp., (C. C. A. 9th, 1938) 98 F. (2d) 129, refused to find jurisdiction. However, this decision is weakened by the fact that the product shipped was gold and the shipping was done intrastate to the United States mint in San Francisco, which in turn shipped it to Denver. Jurisdiction has been upheld in a situation of the second type in Clover Fork Coal Co. v. National Labor Relations Board, (C. C. A. 6th, 1938) 97 F. (2d) 331.

Comparable situations might arise on the supply end of the business. Thus in National Labor Relations Board v. Idaho-Maryland Mines Corp., (C. C. A. 9th, 1938) 98 F. (2d) 129, the court refused to base jurisdiction for the board on facts similar to (1) except that the jobber was selling supplies to the manufacturer sought to be regulated. However, a different result might have been reached if it could have been shown that the jobber merely forwarded the order for the supplies to the one who produced them, who in turn shipped the order directly to the manufacturer. Unless there is a distinction between buying and selling, the answers should be identical whether the attempted basis for jurisdiction concerns supplies or finished goods.

change in ownership.[12] The principal case raises the question whether an independent plant performing a service on goods involved in a continuous flow of such interstate commerce is subject to the act.[13] As the opinion indicates, the issue in the lower court was confined chiefly to the necessity for a transfer of title at some place along the interstate journey.[14] This question was quickly disposed of by the Supreme Court,[15] the dispute there centering principally around the smallness of the volume of commerce involved. Surprisingly, the dissent did not mention the requirement of substantiality, but was content to rely on doctrines prevalent before the *Jones & Laughlin* case.[16] The majority disposed of the issue with the statement that the test "is not the volume of the interstate commerce which may be affected. . . ." [17] In this statement the dissent finds cause for deep concern, fearing an overextension of federal control.[18] If the Court is not repudiating the requirement of substantiality of effect on interstate commerce, a meaning other than size must be attributed to the term. Conceivably it might merely be a synonym for "close" or "direct," and there was no doubt as to the proximity of respondent's labor relations to interstate commerce.

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[12] National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1937) 91 F. (2d) 509.

[13] National Labor Relations Board v. Nat. New York Packing & Shipping Co., (C. C. A. 2d, 1936) 86 F. (2d) 98, is a case upholding jurisdiction on essentially similar facts, being distinguishable only on the grounds that the goods remained out of interstate commerce a shorter time and underwent no physical change.

[14] 59 S. Ct. at 670: "The Board's petition . . . was denied by the Court of Appeals for the Third Circuit, 98 F. (2d) 615 [(1938)], on the ground that respondents were not themselves engaged in interstate commerce and had no title or interest in the raw materials or finished products. . . ."

[15] 59 S. Ct. at 671: "It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title. . . ."

[16] An argument that the substantiality test laid down in the Jones & Laughlin case requires that the employer sought to be regulated transact a considerable business across state lines could be cogently made. Instead the dissent relied on Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6 (1888), and related cases.

[17] 59 S. Ct. at 672. Instead it is "the existence of a relationship of the employer and his employees to the commerce such that . . . unfair labor practices have led or tended to lead 'to a labor dispute burdening or obstructing commerce.' "

[18] In caustic language the dissent stated that "The resulting curtailment of the independence reserved to the states and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system." 59 S. Ct. at 675.