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COMMENTS

THE RAILWAY LABOR ACT DECISION

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Preliminary

The decision of the Supreme Court of the United States which sustained the constitutionality of the Railway Labor Act[1] was delivered by Mr. Justice Stone and is reported in 57 Sup. Ct. 592. Any discussion of this decision seems at first blush to come as an anticlimax to the more recent decisions of the Court in sustaining the constitutionality of the

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[1] The Railway Labor Act of May 20, 1926, C. 347, 44 Stat. 577, as amended June 21, 1934, C. 691, 48 Stat. 1185, U. S. C. Title 45, Sections 151-163.

National Labor Relations Act,[2] more familiarly known as the Wagner Act. However, an examination of this decision in the light of the authorities and reasoning therein contained undoubtedly aids in a proper understanding of the opinions handed down on the Wagner Act, which to many in the profession were startling in their implications. The Court in these latter decisions quoted considerably from the earlier opinion sustaining the Railway Labor Act, and therefore it seems appropriate that this decision should be carefully considered.

The Railway Labor Act

The Railway Labor Act of 1926 as amended in 1934, which was the subject of the Court's decision, was the result of a long term congressional policy to prevent the interruption of interstate commerce by labor disputes and strikes and to provide a machinery for the amicable adjustment of such disputes between railroad labor and railroad management. The more recent legislative treatment of this problem began in 1920 with the enactment of the Transportation Act of that year.[3] Title III of this Act concerned labor relations between the carriers which were then returned to private management following the World War and their employees. After this Act was in operation for some time its disabilities became apparent and the Railway Labor Act of 1926 was enacted. The basic purpose of Congress remained unchanged, but the statutory scheme designed to effectuate that purpose was modified as the means to achieve the end sought became ineffective. Such legislative experience also led to the 1934 amendments to the Act. This evolutionary development of legislation leading gradually to modifications as the need for them is apparent is desirable, and there is abundant evidence that this process will continue in so far as the question of labor policy is concerned.[4]

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[2] Associated Press v. National Labor Relations Board (No. 365), 57 S. Ct. 650, and companion cases decided April 12, 1937;

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615,

National Labor Relations Board v. Fruehauf Trailer Company, 57 S. Ct. 642;

National Labor Relations Board v. Friedman-Harry Marks Clothing Company, Inc. 57 S. Ct. 645,

Washington, Virginia and Maryland Coach Company v. National Labor Relations Board, 57 S. Ct. 648.

[3] Transportation Act of 1920, Title III, Section 301, Fed. Stat. Ann., 1920 Supp. pp. 87-88, 41 Stat. L. 469.

[4] Mr. Chief Justice Hughes in National Labor Relations Board v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615 (628), said "The Act has been criticised as one sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may

In Section 2 of the amended Act the general purposes of the legislation are set out: To avoid any interruption to interstate commerce, to forbid any limitation upon the freedom of association or organization of employees with a labor organization; to provide for the independence of carriers and employees in the matter of self-organization; to provide for the prompt settlement of disputes and grievances growing out of the application or interpretation of agreements covering rates of pay, rules or working conditions.

Then follow the all important parts of this Section under the heading of "General Duties." After setting out that the carriers are under a duty to exert every reasonable effort to maintain and make agreements concerning rates of pay, rules and working conditions and to decide all disputes with expedition in conference with the representatives duly authorized and designated by the respective parties, the paragraph marked "Third" extends to both carriers and employees the right to designate and choose representatives without interference, coercion or influence by either party. The paragraph marked "Fourth" reiterates the right of employees to organize and bargain collectively through representatives of their own choosing[5] and further significantly provides, "The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purpose of this Act."

It is then provided that no carrier shall deny or question the right of an employee to join or organize a labor organization, nor shall any carrier interfere in any way with such organization, nor use the funds of the carrier in maintaining and assisting a labor organization, nor to coerce or attempt to induce an employee to join a particular labor organization nor to deduct from wages, dues or assessments to labor organizations or assist in any way in their collection. And "Fifth" carriers are prohibited from requiring any person seeking employment to promise to join or refrain from joining a labor organization as a condition of that employment or if any such contracts are in existence upon the effective date of the act such conditions are no longer binding.

The paragraph marked "Sixth" provides that in case of a dispute

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be responsible; that it fails to provide a more comprehensive plan—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not 'forbid' cautious advance, 'step by step' in dealing with the evils which are exhibited in activities within the range of legislative power."

[5] American Steel Foundries v. Tri-City Central Trade Council, 257 U. S. 184 (209).

between the carrier and the employees arising out of grievances or the interpretation or application of agreements concerning the rate of pay, rules or working conditions, that it shall be the duty of the designated representatives to specify the time and place for conference within ten days after receipt of a notice of a desire on the part of either party to confer in respect to such dispute.

Paragraph "Ninth" makes provision for the Mediation Board to investigate any dispute which should arise as to who are the chosen representatives of the employees and by the use of appropriate means to ascertain such representatives by secret ballot or otherwise and to certify after determination the names of the individuals or organizations which have been duly elected as representatives. Then follows the provision upon which both counsel and the court concentrated a major part of argument and opinion. "Upon receipt of such certification the carrier *shall treat* (our italics) with the representatives so certified as the representatives of the craft or class for the purposes of this Act."

The Act then provides for the creation and duties of the Adjustment Board and the Mediation Board and sets out the mechanics for the interpretation and enforcing of agreements entered into by the parties and for a system or arbitration providing there is voluntary submission by the parties. The parts of the statute already expressly referred to are the ones which are essential to the court's decision, and although the subsequent sections relative to arbitration, etc., provide interesting reading they are outside the scope of the issues treated by the court's opinion.

The Factual Setting

System Federation No. 40 of the Railway Employee's Department of the American Federation of Labor prior to July 1, 1922, represented the mechanical department employees of the Virginian Railway. The mechanical department employees of the railway comprise six shop crafts. These shop crafts are divided between (1) so-called "back shop employees"[6] whose work consists solely of "classified repairs"[7] and "store order work" and (2) employees engaged in making "running repairs."[8]

On July 1, 1922, a strike was called. It was unsuccessful. On July 3, 1922, the Railway Labor Board adopted a resolution calling upon employees of carriers to organize themselves into associations for the purpose of collective bargaining. Pursuant to this resolution there was

[6] Approximately one-third of the mechanical department employees are back shop employees.

[7] "Classified repairs" are heavy repairs made to locomotives and cars, such as rebuilding and reconditioning for service. The locomotives and cars are withdrawn from service for an average period of approximately 105 days for the former and 109 days for the latter.

[8] "Running repairs" are repairs to equipment other than classified.

formed an organization known as the Mechanical Department Association of the Virginian Railway. The District Court in the case under review[9] found as a fact that the Association was to a considerable extent company-controlled. The Association continued in existence until 1927 without opposition at which time the Railway Employees' Department of the American Federation of Labor made an effort to organize the mechanical department employees into unions affiliated with itself. In 1934 the president of the Railway Employees' Department of the American Federation of Labor claimed the right to represent the mechanical department employees, which claim was disputed by the Association and the carrier.

The services of the Board of Mediation as organized under the Railway Labor Act of 1926 were invoked. Its investigation revealed that the Federation had secured authorization from a substantial number of employees affected, but not from a majority. Nothing further was done until subsequent to the passage of the amended Railway Labor Act on June 21, 1934. The matter was then referred to the new National Mediation Board, which decided to hold an election[10] among the mechanical department employees. The National Mediation Board certified System Federation No. 40 as the representative for the employees of the mechanical department.

The District Court further found that by interviews and a pamphlet known as the "Sasser Statement" the railway exerted its influence upon the employees in an effort to interfere with the choice of representatives. After the National Mediation Board had issued its certification the carrier refused to recognize or to treat with the Federation. The District Court also found that subsequent to the certification of the Board there was an attempt to organize the Independent Shop Craft Association, ostensibly formed by an employee, Hearne, but that such organization was not a good faith attempt to represent the crafts, but was in fact an employee acting primarily at the behest of the railway. The Federa-

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[9] The opinion below of the District Court of the United States for the Eastern District of Virginia is reported in 11 F Supp. 621.

[10] The election resulted as follows:

	Eligible	For Federation	For Association
Sheet Metal Workers	52	37	9
Carmen and Coach Cleaners	266	98	20
Machinists	267	141	41
Blacksmiths	46	22	8
Electrical Workers	114	80	11
Boilermakers	79	51	9
Totals	824	429	98

tion then filed an action in the District Court seeking injunctive relief in two respects:

First: They sought a prohibitory injunction restraining the carrier from further acts of interference, influence or coercion toward the employees in question. The prayer for this relief was predicated upon Section 2, Third, of the Railway Labor Act.

Second: They sought a mandatory injunction compelling the carrier to treat with the Federation as the representative of these employees as required by Section 2, paragraph ninth of this same Act, wherein it is provided that "upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act."

The relief prayed for was granted in both respects by the lower court, and its position was sustained by the Circuit Court of Appeals.[11]

The Circuit Court of Appeals expressly concurred with the findings of fact of the District Court and therefore the Supreme Court took the findings undisturbed for the purposes of the appeal, there being no showing of palpable error.[12]

The Issues and Decision Thereon

A. The Mandatory Injunction Question.

The part of the decree which prohibited the carrier from interfering with the employees in their free choice of representatives or in fostering a company union was not challenged by the petitioner. Such an injunction was clearly within the powers of a court sitting in equity and the sections of the statute upon which this part of the decree was predicated had already been held to be properly within the congressional power.[13] However, the decree also required the petitioner to "treat" with the respondent. Thus an affirmative obligation was established by mandatory injunction. Further the court in order to effectuate the affirmative obligation utilized the negative injunctive process of the classic case of *Lumley v. Wagner*[14] and decreed that the petitioner refrain from enter-

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11 The opinion below of the United States Circuit Court of Appeals for the Fourth District is reported in 84 F (2d) 641.

12 Baker v. Schofield, 243 U. S. 114 (118), and cases cited, Charleston, S. C., Mining and Mfg. Co. v. U. S., 273 U. S. 220 (223); Texas & N. O. R. R. Co. v. Brotherhood, etc., 281 U. S. 548 (558), Peck Mfg. Co. v. General Motors Corp., 57 S. Ct. 1 (2).

13 Texas & N. O. R. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548 (558).

14 Lumley v. Wagner, Chancery, 1852, 1 De G. M. & G. 604, in which Sir Edward Sugden said, "It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant, J. Wagner, from performing at any other theatre while this court had no power to compel her to

ing into collective labor agreements with anyone but the respondent. Thus the Supreme Court was confronted with the question of whether or not the legislature by Section 2, Ninth, imposed upon a carrier an obligation "to treat" which was enforceable in a court of equity. The question was double edged. Did Congress intend by this Act to impose a legal obligation "to treat?" Further without regard to congressional intent was the court capable by equitable process of enforcing such an obligation? And superimposed upon this question was the further consideration of whether or not the power of the court to act in this case was restricted by sections of the Norris-La Guardia Act.[15]

The Transportation Act of 1920 provided that "It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of a carrier growing out of any dispute between the carrier and the employees or subordinate officers thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees. . . ." If the dispute was not decided in conference it could be referred to the board which would make findings, and if necessary publish the same. The question of the legal enforceability of this section had been brought before the Supreme Court in two cases.[16]

The court, speaking through Mr. Chief Justice Taft, said in the first case:

> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding."

This position was reiterated by Chief Justice Taft in the second case.

The Transportation Act was substantially re-enacted in the Railway Act of 1926 as to the provisions quoted above, but did add the prohibition against coercive measures designed to influence or interfere with

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perform at her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus cause her to fulfill her engagement."

[15] March 23, 1932, C. 90, Art. 1, 47 Stat. U. S. C., Title 29, Sec. 101; Art. 2, 47 Stat. U. S. C., Title 29, Sec. 102; Art. 4, 47 Stat. U. S. C., Title 29, Sec. 104 (e); Art. 6, 47 Stat. U. S. C., Title 29, Sec. 106; Art. 7, 47 Stat. U. S. C., Title 29, Sec. 107, Art. 9, 47 Stat. U. S. C., Title 29, Sec. 109.

[16] Pennsylvania Railroad Company v. United States Railroad Labor Board, 261 U. S. 72; Pennsylvania System v. Pennsylvania Railroad Company, 267 U. S. 203.

self organization or designation of representatives. The Supreme Court held that as to these additional provisions they were legally enforceable obligations, and said in the opinion[17] in the "Railway Clerks Case" which was delivered by Mr. Chief Justice Hughes:

"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with expedition in conference between authorized representatives, but added the distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect. *ExParte Public National Bank,* 278 U. S. 101, 104. While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

Thus the court found an enforceable obligation in the Railway Labor Act of 1926, but not at the same point it had before refused to find such an obligation in the Transportation Act. Then the amendments to the 1926 Acts were added in 1934 and it was provided that the carriers upon receipt of the certification from the Board "shall treat" with the representative so certified. Has the unenforceable duty "to exert every reasonable effort to make and maintain agrements" been transformed into a legally enforceable one by the mere addition to the statute of a requirement that carriers "shall treat" with the chosen representative? On this point the court said in the decision under review:

"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the Courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by these provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the Labor Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Railway Clerks case, supra, lend support to the contention that its enactments which are mandatory in form and capable of enforcement by judicial process were intended to be without legal sanction."

It is clear that the court now feels that the changes in the Railway Labor Act manifest an intention upon the part of Congress to impose an enforceable obligation.

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[17] Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548.

But is not this affirmative declaration of duty "to treat" an imperfect obligation beyond the powers of a court of equity to enforce? Does not the duty depend upon the feelings, desires and mental attitudes of the respective parties and thus concern a subject matter beyond judicial control? The situation is analogous to that of enforcing specific performance of contracts of singers, artists and arbitration.[18] On this point the court said:

"Whether the decree will prove useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case . . more is involved than the settlement of a private controversy without appreciable consequence to the public. . . . Courts of equity may, and frequently do, go much further both to give and withhold relief in the furtherance of the public interest than they are accustomed to go when only private interests are involved. . The fact that Congress had indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief."

The negative phase of the decree before mentioned cannot be neglected when consideration is given to the possibility of the court's decree resulting in a useless and idle gesture. And it is apparent that the court, although appreciating the difficulty of enforcing such an affirmative obligation, still thought that the decree of the District Court was "worth the effort."

The petitioner advanced a novel suggestion that the Norris-LaGuardia Act precluded the court from granting an injunction prohibiting the act of giving publicity to the facts involved in any labor dispute. The Act provides in Section 4, "No court of the United States shall . . . issue any restraining order or . . . injunction in any case involving . . . any labor dispute to prohibit any person . . . interested in such dispute . . . from doing . . . any of the following acts: . . . (e) Giving publicity to the existence of, or the facts involved, in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." It was argued that the "Sasser Statement," heretofore mentioned, was an act upon the part of the petitioner to give such publicity to a labor dispute. In the light of the court's findings of fact that the statement was an attempt to coerce employees, it is difficult to view it as an act to publicize facts of a labor dispute. Further the Norris-LaGuardia Act states that no organization or association should be held liable for the unlawful acts of individuals or officers unless there was clear evidence of participation by such association. Again reviewing the court's findings of fact there was such evidence. The Act also provides that only injunctions or restraining orders should issue from a

[18] Tobey v. Bristol, Fed. Cas. No. 14,065 at page 1321 (C. C. Mass., 1845), Pomeroy's Equity Jurisprudence (4ed.) at Section 2180.

court which contained language prohibiting only the specific acts complained of in the bill of complaint. This is designed to prevent "blanket injunctions" from issuing from the courts and not to preclude the courts from issuing mandatory injunctions. But the court disposed of the whole question on the basis that the Norris-LaGuardia Act established a general rule applicable to the granting of injunctions in cases growing out of labor disputes and that the Railway Labor Act as amended, and enacted subsequent to the Norris-LaGuardia Act and imposing specifiic statutory obligations, would control.[19] The court said·

"Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

B. The Interstate Commerce Question.

The fact that Congress has the power to regulate the relations of employees and rail carriers by such means as are reasonably calculated to prevent an interruption to interstate commerce by strikes and attendant consequences cannot be questioned.[20] The question that arises here is whether or not the Railway Labor Act, as amended, can properly be said to apply to "back-shop" employees who are admittedly not engaged in interstate commerce, but whose activities are strictly intrastate in their character. The court has held that manufacture is not commerce,[21] and the analogy between such activity and that involved in the decision in question is apparent. And even though the products of manufacture or production be intended to be transported or sold outside of the state, the fact does not render such production or manufacture, as such, subject to Federal regulation under the commerce clause.[22]

But the court in the Railway Labor Act decision proceeds clearly upon the assumption that the activities of the "back-shop" employees are not within themselves interstate commerce and could not be regulated as such. But the power of Congress over interstate commerce carries with it as a necessary concomitant, the power to protect that commerce by the regulation of activities which may be intrastate in character but which

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19 Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548 (571), Callahan v. U. S., 285 U. S. 515 (518), Ex Parte United States, 226 U. S. 420 (424), Rodgers v. U. S., 185 U. S. 83 (87-89); International Alliance v. Rex Theatre Corp., 73 F (2d) 92 (93).

20 Wilson v. New, 243 U. S. 332 (347-348).

21 Crescent Cotton Oil Company v. Mississippi, 257 U. S. 129; Carter v. Carter Coal Company, 298 U. S. 238.

22 Carter v. Carter Coal Company, 298 U. S. 238, Coe v. Errol, 116 U. S. 517, Arkadelphia Milling Company v. St. Louis S. W Ry. Co., 249 U. S. 134, Heisler v. Thomas Colliery Company, 260 U. S. 245, Chassaniol v. City of Greenwood, 291 U. S. 584.

"have such a close and substantial relation to interstate commerce that there control is essential or appropriate to protect that commerce from burdens and obstructions."[23] On this point the court said:

"The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, 31 S. Ct. 621, 55 L. Ed. 878; cf. *Pedersen v. Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 151, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. See *United States v. Railway Employees' Department of American Federation of Labor (D. C.)*, 290 F. 978, 981, holding participation of back shop employees in the nation-wide railroad shopmen's strike of 1922 to constitute an interference with interstate commerce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress."

The court thus recognizes that the employees who are participating in purely intrastate activities are still subject to the interstate commerce power of Congress when that power is exercised by such legislation as

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[23] Where the relationship is sufficiently direct: Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U. S. 612. (The length of hours of service of those engaged in interstate and intrastate commerce); Southern Railway Co. v. U. S., 222 U. S. 20 (safety appliance act as to cars moving in intrastate and interstate commerce); Houston E. & W Texas Ry. Co. v. U. S., 234 U. S. 342 (Federal control over rates on intrastate traffic), The Minnesota Rate Cases, 230 U. S. 352 (state control excluded over rates on intrastate traffic); Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563 (rate control), Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548 (Railway Labor Act sustained as applying to accounting and clerical forces); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (combination to restrain interstate commerce by intrastate activities); Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U. S. 37 (combination to restrain interstate commerce by intrastate activities).

Where the relationship is too remote: A. L. A. Schechter Poultry Corp. v. U. S., 295 U. S. 495 (hours and wages in poultry slaughter houses and sales made to retail dealers and butchers), First Employers Liability Cases, 207 U. S. 463 (Federal regulation applying to compensation for injuries of employees not engaged in interstate commerce).

the Railway Labor Act, as amended, which is reasonably calculated to minimize and eliminate interruptions and obstructions to interstate commerce. This decision goes no further than stating that labor relationships between employees and the carriers are cognizable by Congress under the interstate commerce power in so far as those relationships concern collective bargaining and in so far as it is to be made an effective instrumentality for the promotion of peaceful and amicable settlement of labor disputes because there is a direct connection between such relationships and repercussions, real or potential, upon interstate commerce.

C. Questions Under the Fifth Amendment.

The Fifth Amendment is not a guarantee of untrammeled freedom of action and of contract.[24] After the court decided that the Railway Labor Act, under the interstate commerce power, was a means chosen by Congress to accomplish a permissible end there was "little scope for the operation of the due process clause." The operation of the Fifth Amendment in this case was further circumscribed because the railroad could not rely upon alleged infringements of its employees' rights.[25] The petitioner's position amounted to the contention that it was being forced to have "business relations" which under the Constitution it was at liberty to refuse, and further that such compulsion "to treat" with respect to the terms of a contract is a part of the contractual process. And since the employer cannot be compelled to take the ultimate step represented by the agreement of contract[26] he cannot be compelled to take the initial steps looking towards the agreement. The court said.

"The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."

The carrier is free under the Act to contract with individual employees as individuals and not as representatives. To the extent that there are representatives the carrier is compelled to treat only with those

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[24] West Coast Hotel Co. v. Parrish, 57 S. Ct. 578, Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186, Liberty Warehouse Co. v. Burley, etc., 276 U. S. 71, Highland v. Russell Car & Snow Plow Company, 279 U. S. 253, Packer Corporation v. Utah, 285 U. S. 104, Nebbia v. New York, 291 U. S. 502; Norman v. Baltimore & Ohio R. Co., 294 U. S. 240.

[25] Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571 (576), Erie R. Co. v. Williams, 233 U. S. 685 (697); Rail & River Coal Co. v. Ohio Industrial Commission, 236 U. S. 338 (349); Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226 (227); Heald v. District of Columbia, 259 U. S. 114 (123).

[26] Adair v. United States, 208 U. S. 161, Coppage v. Kansas, 236 U. S. 1.

who represent the majority of the employees. To this extent the freedom of the carrier is circumscribed, but we take it that such limitation is justified, since it is a necessary consequence of the proper exercise of the interstate commerce power.

D. The Question as to the Majority.

Section 2, Fourth, of the Railway Labor Act provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act." The interpretation of the word "majority" as used in this section, presents the question of whether the choice is dependent upon a majority of all of those qualified to vote, or whether in cases where a majority of those qualified to vote participate in the election, a majority of the votes cast is sufficient. The court applied the latter rule and said

> "Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carrol County v. Smith,* 111 U. S. 556; *Douglas v. Pike County,* 101 U. S. 677; *Louisville & Nashville R. Co. v. Sneed,* (Tenn.) 637, *Montgomery County Fiscal Court v. Trimble,* 104 Ky. 629. Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.' *County of Cass v. Johnston,* 95 U. S. 360, 369, and see *Carroll County v. Smith, supra.*
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> "We see no reason for supposing that Section 2, Fourth, was intended to adopt a different rule."

The analogy to the majority vote of the electorate or of stockholders is not a perfect one. In the Railway Labor Act we are dealing with a majority vote designed to reveal a choice upon the part of employees as to representatives. The very issue as to whether or not the employee desires to be represented by any association or organization is just as much involved as the question as to who that representative should be. To hold that if an employee refuses to participate in an election that this fact indicates an assent to be represented by the representative who happens to be chosen by a majority of those voting seems to be straining the concept that "inaction implies consent."