LEGISLATION

Congress Assails Industrial Thuggery

With the passage of the Byrnes Act,[1] making the interstate transportation of strikebreakers a felony, Congress has at last taken a belated [2] and uncertain [3] step professedly directed toward the elimination of a national institution which has for roughly half a century made the United States unique as the one civilized nation of the Western world wherein private armies of mercenaries may roam the land spreading violence and bloodshed at the behest of individual citizens.[4] For the use of professional strikebreakers and strike guards has brought about in this country what has well been termed "an irresponsible extra-legal form of warfare." [5]

Conditions Giving Rise to the Act

It is beyond cavil that the use of professional strong-arm men by employers has invariably been a direct provocation of violence in labor disputes.[6] There should be little wonder that the very sight of these imported thugs is usually enough to infuriate a group of striking employees, for they are customarily drawn from the very lowest elements of society, from the underworld gangs of the big cities and their hangers-on, many of these so-called detectives having police records of the worst kind.[7] While there have undeniably been glaring instances of violence by strikers as well as by their opponents,[8] still the predominantly

1. Pub. L. No. 776, 74th Cong., 2d Sess. (June 24, 1936), 18 U. S. C. A. § 407a (Supp. 1936): "Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person with intent to employ such person to obstruct or interfere, in any manner, with the right of peaceful picketing during any labor controversy affecting wages, hours, or conditions of labor, or the right of organization for the purpose of collective bargaining, shall be deemed guilty of a felony and shall be punishable by a fine not exceeding $5,000, or by imprisonment not exceeding two years, or both, in the discretion of the court."

2. Over twenty years ago sweeping recommendations were made to Congress for the enactment of measures that would probably have wiped out professional strikebreaking as a national business. See FINAL REPORT OF U. S. COMMISSION ON INDUSTRIAL RELATIONS (1915) 152. Congress failed to act, however.

3. See *infra* pp. 411-413.

4. See HUNTER, VIOLENCE AND THE LABOR MOVEMENT (1914) 280-281; FINAL REPORT OF U. S. COMMISSION ON INDUSTRIAL RELATIONS (1915) 142.

5. See FITCH, CAUSES OF INDUSTRIAL UNREST (1924) 258. The public at large, however, would probably be startled to learn of these semi-anarchical conditions in industrial relations, for private detectives and strike guards are still apt to be generally regarded as wholly admirable, if not downright romantic characters. See HUNTER, *op. cit. supra* note 4, at 282.

6. See H. R. REP. No. 2431, 74th Cong., 2d Sess. (1936) 1; SEN. REP. No. 1420, 74th Cong., 1st Sess. (1935) 1; *Hearings before Subcommittee No. 1 of Committee on Judiciary of House of Representatives on S. 2039*, 74th Cong., 2d Sess. (1936) 2 (statement of Senator James F. Byrnes).

For example, the bloody Homestead strike in 1892 was set off when the Carnegie Steel Company ordered the Pinkerton detective agency to send to Homestead 300 men armed with Winchester rifles.

7. See *Hearings before Subcommittee of Senate Committee on Education and Labor Pursuant to S. Res. 266*, 74th Cong., 2d Sess. (1936) 130, 333-342; HUNTER, *op. cit. supra* note 4, at 284-288. For a detailed history of the strikebreaking business in the United States see LEVINSON, I BREAK STRIKES (1935), especially pp. 105-118, 257-265, for the criminal character of the operatives thus employed. A more romantic point of view regarding his chosen profession is presented by the founder of the nation's longest established dynasty of strikebreakers in PINKERTON, STRIKERS, COMMUNISTS, TRAMPS AND DETECTIVES (1878).

8. At Herrin, Illinois, in 1923, a mob of strikers and strike sympathizers beat to death with clubs twenty-one unarmed strikebreakers. See REPORT OF U. S. COAL COMMISSION ON CIVIL LIBERTIES IN THE COAL FIELDS, SEN. DOC. No. 195, 68th Cong., 1st Sess. (1925) Part I, 164-168.

criminal character of the men hired as strikebreakers and guards stands out clearly.[9] Moreover, the double-dealing of the detective agencies which supply them always tends to create or protract turbulence and disorder.[10]

In spite of the highly unsavory character of the industrial detective agencies and their operatives, their use by employers of labor is apparently wholly reputable and is so widespread as to amount to a national industry operating on a large scale.[11] In view of the notorious rascality of labor spies and strikebreakers, it

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On the other hand, in the Ludlow massacre, during the Colorado coal strike of 1913-1914, thirteen women and children and six strikers were shot down and killed by company guards and militiamen. See WEST, REPORT ON THE COLORADO STRIKE (U. S. Commission on Industrial Relations, 1915) 124-138.

9. See Gleason, *Industrial Democracy and Gunmen* (1921) 25 NEW REPUBLIC 318; Owens, *Gunmen in West Virginia* (1921) 28 NEW REPUBLIC 90. For some representative criminal deeds committed by guards and detectives in the course of strikebreaking work, see State v. Newman, 127 Minn. 445, 149 N. W. 945 (1914) (mine guards convicted of kidnaping leader of striking miners); State v. Meese, 200 Wis. 454, 225 N. W. 746 (1929) (bombing by guard furnished by detective agency); Ericson, *Good Men and True* (1929) 60 NEW REPUBLIC 292 (union miner beaten to death by three Pennsylvania coal and iron policemen); Philadelphia Inquirer, Feb. 16, 1915, p. 1 (guards convicted of manslaughter); United Mine Workers Journal, Aug. 1, 1920 (detective convicted of murder of union member); A. F. of L. Weekly News Service, Sept. 2, 1929 (detective convicted of attempt to bribe union organizer).

10. It is a common practice of the industrial detective agencies to insure the prolongation of their employment by having their spies, after insinuating themselves into the confidences of the labor unions, incite strikes and advocate violence by the union members. See Wood Mowing & Reaping Mach. Co. v. Toohey, 114 Misc. 185, 192-195, 186 N. Y. Supp. 95, 100-101 (Sup. Ct. 1921); *Hearings before Subcommittee of Senate Committee on the Judiciary on S. 1482*, 70th Cong., 1st Sess. (1928) 129-130, 236, 278, 543, 564; HOWARD, THE LABOR SPY (1924) 178-197.

And after the actual commencement of a strike, violence and rioting are usually instigated by the thugs hired as strikebreakers, and not by the strikers. For example, in the Pullman strike of 1894 the strikers detailed 300 of their number to guard the property of the Pullman Company, much of which was wrecked or burned by the very persons who had been engaged as "detectives" and deputy marshals. It is ever true that the employer has everything to gain by encouraging violence after a strike has begun, since the result is always likely to be direct suppression of the striking element by the forces of organized government, or at the very least, the marshalling of public opinion against the strikers. On the other hand, the strikers have everything to lose by rioting and fighting, and in fact the union leaders usually go out of their way to avoid any violent display or destruction of property. See HUNTER, *op. cit. supra* note 4, 300-319. Judge Amidon took this point of view in Great Northern Ry. v. Brosseau, 286 Fed. 414, 418 (D. N. D. 1923). See also *Hearings before Subcommittee of Senate Committee on Education and Labor Pursuant to S. Res. 266*, 74th Cong., 2d Sess. (1936) 120.

11. For example, in 1920 the notorious Bergoff Service Bureau is reputed to have supplied the Erie Railroad with 6000 strikebreakers at a cost of $2,000,000. In 1916 the same agency did a million-dollar strikebreaking job for the Interborough Rapid Transit Company. See Basso, *Strike-Buster: Man Among Men* (1934) 81 NEW REPUBLIC 124. In the railroad shop strike of 1922, 53,831 strike guards were hired by 50 railroads. See United States v. Railway Employees' Dep't of A. F. of L., 290 Fed. 978, 981 (N. D. Ill. 1923). Of 187 licensed detective agencies in New York, 55 solicit strikebreaking work. See Levinson, *Strikebreaking Incorporated* (1935) 171 HARPER'S 719, 724.

In some industries combinations of employers perform for themselves many of the services that the detective agencies furnish to other employers, importing strikebreakers and guards when local men cannot be obtained. *E. g.*, the Stove Founders' National Defense Association; the National Founders' Association; the National Metal Trades Association; the National Erectors' Association; the United Typothetae of America. See BONNETT, EMPLOYERS ASSOCIATIONS IN THE UNITED STATES (1922) 46, 75-76, 109-110, 143, 246; WATKINS, LABOR PROBLEMS (1929) 567-572.

The whole system seems to be a peculiarly American one. Of the few private detective agencies in England and continental Europe, none engages in industrial work. See WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 183. However, the "Free Labor movement" in England is maintained to supply strikebreakers and to protect them, as well as to lobby against unions. See COLLISON, THE APOSTLE OF FREE LABOR (1913) 94.

has been suggested that the only theory on which the pouring forth of huge sums annually to these agencies can be explained is that the employers are possessed by an unreasoning belief that the membership of labor unions is predominantly and inherently criminal and that it takes a thief to catch a thief.[12]

Previous attempts to hinder the nefarious operations of the Pinkertons, the Burnses, the Bergoffs, and their ilk, whether in the form of state legislation, municipal ordinances, or summary action by executive officers, have been almost uniformly unsuccessful. The importation of persons to fill the places of the striking employees, *i. e.*, strikebreakers in the strict sense as distinguished from strike guards, has always been relatively untrammeled by statutory restrictions,[13] save for the requirement imposed by about one-fourth of the states that in advertising for new employees during a strike the employer must notify the prospective strikebreakers of the existence of a labor dispute.[14] The courts of a number of jurisdictions have upheld the constitutionality of this type of statute.[15]

With regard to the use of armed guards, regulatory statutes of two general types have been fairly popular with state legislatures [16] without unduly distressing the strikebreaking agencies. The so-called "anti-Pinkerton laws" prohibit the importation of armed guards from outside the state.[17] But the state governments seem to regard the mere enactment of such laws as an all-sufficient gesture and make no attempt to enforce them by bringing prosecutions thereunder.[18] The common practice of locally commissioning private guards as deputy sheriffs or special police officers has also led some states to require certain qualifications of citizenship and residence as prerequisites to being enlisted for police work.[19]

12. See WITTE, *op. cit. supra* note 11, at 188.

13. For the first and most noteworthy published challenge of the right of employers to import strikebreakers, see FINAL REPORT OF U. S. COMMISSION ON INDUSTRIAL RELATIONS (1915) 142-144, wherein it is suggested that the two traditional rights, of strikebreakers to work and of employers to do business, are based upon misconceptions by the courts.

14. CAL. GEN. LAWS (Deering, 1931) Act 4728; COLO. ANN. STAT. (Courtright's Mills, 1930) §§ 4479-4480; ME. REV. STAT. (1930) c. 54, §§ 7, 8; MASS. GEN. LAWS (1932) c. 149, §§ 22, 23; MINN. STAT. (Mason, 1927) §§ 10392-10393; MONT. REV. CODE ANN. (1935) §§ 11220-11222; NEV. COMP. LAWS (Hillyer, 1929) §§ 2772-2774; N. H. PUB. LAWS (1926) c. 176, §§ 36-39; OKLA. STAT. (1931) §§ 10879-10880; ORE. CODE ANN. (1930) §§ 49-1001, 49-1002; TENN. CODE ANN. (Michie, 1932) §§ 11363-11364; WIS. STAT. (1931) § 103.43.

In a few other states employment agencies are required to give notice of the presence of strikes in plants calling on them for employees, though the employers are not so required. *E. g.*, OHIO ANN. CODE (Throckmorton, 1934) § 896-3 (d); PA. STAT. ANN. (Purdon, 1931) tit. 43, §§ 607-608 (also requires employer to inform employment agency); TEX. COMP. STAT. (1928) art. 5221. This seems to be a general practice of employment agencies, even independently of statute. See WITTE, *op. cit. supra* note 11, at 209, n. 3.

15. *E. g.*, Comm. v. Libbey, 216 Mass. 356, 103 N. E. 923 (1914); Biersach & Niedermeyer Co. v. State, 177 Wis. 388, 188 N. W. 650 (1922). *Contra:* Josma v. Western Steel Car & Foundry Co., 249 Ill. 508, 94 N. W. 945 (1911).

16. See WITTE, *op. cit. supra* note 11, at 211.

17. ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 2792-2793; COLO. ANN. STAT. (Courtright's Mills, 1930) § 4481; KY. CONST. § 225; KY. STAT. (Baldwin's Carroll, 1930) § 1376; MINN. STAT. (Mason, 1927) § 10501 (prohibits maintaining armed force for hire within state); MO. REV. STAT. (1929) § 4237; MONT. CONST., art. 3, § 31; MONT. REV. CODE ANN. (1935) § 10925; NEB. COMP. STAT. (1929) § 28-725; OKLA. STAT. (1931) § 10881; S. C. CONST., art. VIII, § 9; TENN. CODE ANN. (Michie, 1932) § 11365; UTAH CONST., art. XII, § 16; WIS. STAT. (1931) § 348.472; WYO. CONST., art. XIX, § 6.

18. See WITTE, *op. cit. supra* note 11, at 211. Probably any such attempt would prove futile, since nearly all such statutes can be circumvented by transporting or hiring the guards separately from any shipment of arms to be used by them.

19. ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 2790-2791; ILL. REV. STAT. (Cahill, 1933) c. 125, ¶¶ 28, 29; KY. STAT. (Baldwin's Carroll, 1930) § 1376; MASS. GEN. LAWS (1932) c. 149, § 176; MO. REV. STAT. (1929) § 4233; NEB. COMP. STAT. (1929) § 28-726; N. Y. CONS. LAWS (Cahill, 1930) c. 41, § 1845; PA. STAT. ANN. (Purdon, 1930) tit. 18, § 871; TEX. COMP. STAT. (1928) art. 5207; W. VA. CODE ANN. (1932) § 6037; WIS. STAT. (1931) § 66.11 (1).

There have also been efforts to regulate the agencies themselves, as well as the individuals supplied by them, through the enactment of laws requiring private detective agencies to have a state license.[20] Inasmuch as most of the agencies regularly operate on the outside edge of the law and are not bothered by legal niceties in any event, the refusal or revocation of a license has consistently proved to be a negligible deterrent.[21]

The attempts of governors, mayors, and police chiefs to prevent, by executive action, violence and destruction at the hands of imported gangsters have been, if possible, even more ineffectual than legislative action.[22] For efforts to keep out or arrest strikebreakers have uniformly been blocked through the issuance of injunctions by courts to whom that nebulous and once sacrosanct property right—to conduct one's business as one sees fit[23]—still seems important enough to demand protection even at a sacrifice of the public peace and order.[24] Similar objections have of course been relied on to impugn the various ordinances and statutes purporting to limit the right to employ strikebreakers and guards.[25] In addition, one case has indicated that a state has no power to restrict the importation of armed guards from another state, not only because to do so would violate the privileges and immunities and equal protection clauses of the Fourteenth Amendment (by withholding from citizens of other states the right to keep and bear arms given by the constitution of the home state) but also because it would be an attempt to regulate interstate commerce and so an interference with the exclusive power of Congress.[26]

Constitutionality

This proposition at least suggests that the commerce power is broad enough to sustain the validity of the Byrnes Act. And such a conclusion does seem clear, unless by possibility the constitutional objections under the Fourteenth Amendment which nullified local regulations of the right to use strikebreakers and armed guards[27] prove sufficiently persuasive to cause the present measure

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20. *E. g.*, CAL. GEN. LAWS (Deering, 1931) Act 2070a; MICH. COMP. LAWS (1929) §§ 8715-8727; N. Y. CONS. LAWS (Cahill, 1930) c. 21, §§ 70-75; WIS. STAT. (1931) §§ 175.07, 175.08 are representative of the common type.

21. For instance, Bergoff's most profitable years were those following the revocation of his license in 1916. At that time and again during revocation proceedings in 1935 Bergoff boasted of his indifference to the matter of having or not having a license. See LEVINSON, *op. cit. supra* note 7, at 182, 298.

22. *Id.*, at 191-193.

23. See Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230, 233 (Ch. 1902).

24. See American Steel & Wire Co. v. Davis, 261 Fed. 800 (N. D. Ohio, 1919) (injunction issued against mayor and police of Cleveland prohibiting the arrest and deportation by police of strikebreakers imported to the city by complainant); Schenectady Ry. v. Whitmyer, 121 Misc. 4, 199 N. Y. Supp. 827 (Sup. Ct. 1923) (injunction issued against mayor and police of Schenectady who, to preserve law and order, had ordered the street car company not to operate its cars during strike); Mullins Body Corp. v. Int. Ass'n of Mach., Local No. 568, 3 LAW AND LABOR 149 (N. D. Ohio, 1921) (mayor and police enjoined from interfering with persons employed or seeking to be employed as strikebreakers); Swift & Co. v. Hague, 2 LAW AND LABOR 9 (N. J. Ch. 1919).

25. *E. g.*, *In re* Reilly, 23 Ohio Nisi Prius (N. S.) 65 (C. P. 1919) (Cleveland ordinance forbidding employment of unlicensed strike guards and giving director of public safety discretion to grant or withhold such licenses *held* unconstitutional as violative of right to protect one's property without interference or hindrance). But *cf.* State v. Gohl, 46 Wash. 408, 90 Pac. 259 (1907) (act making crime of organizing, maintaining and employing an armed body of men *held* constitutional as within state's police power).

26. See Arkansas v. Kansas & T. Coal Co., 96 Fed. 353, 358-368 (C. C. W. D. Ark. 1899).

27. See *supra* notes 13, 24-26.

to fail under the correlative limitations imposed on federal action by the Fifth Amendment. But it is well recognized that the commerce clause is in effect a limitation on any preconceived property interests when measured by the Fifth Amendment.[28] In only one case [29] has the Supreme Court held federal legislation, which would otherwise be a valid exercise of the commerce power, invalid as violative of the due process or liberty clauses.

And it has, of course, long since been held by the Court that "commerce among the States . . . includes the transportation of persons." [30] Nor should doubts as to the constitutionality of the present Act be raised by the decisions which have held that the businesses of providing baseball games [31] and of booking vaudeville acts [32] in several states are not interstate commerce within the meaning and purpose of Section 7 of the Sherman Anti-Trust Law,[33] even though these businesses necessarily involve the repeated travelling of players from one state to another. It is important to note that the question of what constitutes interstate commerce may have a different answer according as the case concerns the right of a state to regulate a transaction in the absence of federal legislation covering the same field,[34] the right of Congress to regulate the actual business,[35] or the right of Congress to regulate or prohibit the transportation of certain classes of passengers across state lines.[36] The distinction seems clear between direct regulation of the interstate transportation of persons and regulation of the business to which such transportation is incidental. On the authority of the

28. GAVIT, THE COMMERCE CLAUSE (1932) 172. "The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or States is not material to be considered." McKenna, J., in Hoke v. United States, 227 U. S. 308, 320 (1913).

And the right of the individual person to go as he pleases among the states is not a right to be transported for an immoral purpose. *Id.* at 321. It is conceivable, but not likely, that the Court may decide that the purpose of using persons to interfere with the right of peaceful picketing is not sufficiently immoral to modify the right of such persons to go where they please. One court has said, by way of dictum, that a state cannot keep an undesirable class of citizens of other states out of its territory merely because they may be expected to breach the peace. See Arkansas v. Kansas & T. Coal Co., 96 Fed. 353, 358-368 (C. C. W. D. Ark. 1899).

29. Adair v. United States, 208 U. S. 161 (1908) (act prohibiting interstate carrier from discharging employee because of membership in labor union *held* unconstitutional); *cf.* Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935). For further analysis of the relation between the commerce and due process clauses, see Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 1, 4.

30. Hoke v. United States, 227 U. S. 308, 320 (1913) (power of Congress to prohibit transportation of women in interstate commerce for purpose of prostitution or debauchery upheld).

31. Federal Club v. National League, 259 U. S. 200 (1922); see American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 459-460, 149 N. Y. Supp. 6, 16-17 (Sup. Ct. 1914); *cf.* Metropolitan Casualty Ins. Co. v. Huhn, 165 Ga. 667, 142 S. E. 121 (1928) (business of providing baseball games between clubs in different states *held* not interstate commerce such as would preclude application of state workmen's compensation act to claim for death of ball player killed while being transported from one game to another).

32. Hart v. Keith Vaudeville Exchange, 12 F. (2d) 341 (C. C. A. 2d, 1926). Accord: Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 147 N. Y. Supp. 532 (1st Dep't, 1914) (producing of grand opera). But *cf.* Marienelli v. United Booking Offices, 227 Fed. 165 (S. D. N. Y. 1914).

33. 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7, 15 (1927).

34. *E. g.*, Interstate Amusement Co. v. Albert, 239 U. S. 560 (1915); Erie Beach Amusements v. Spirella Co., 105 Misc. 170, 173 N. Y. Supp. 626 (County Ct. 1918).

35. *E. g.*, Federal Club v. National League, 259 U. S. 200 (1922); Hart v. Keith Vaudeville Exchange, 12 F. (2d) 341 (C. C. A. 2d, 1926).

36. *E. g.*, Hoke v. United States, 227 U. S. 308 (1913); Gooch v. United States, 56 Sup. Ct. 395 (1936) (Federal Kidnaping Act *held* adequately to express intention of Congress to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that captor might secure some benefit).

baseball [37] and vaudeville [38] cases, a detective agency in New York may not, simply by virtue of the fact that in order to break a strike in Chicago it transports strikebreakers to the latter city as part of its regular business, be itself subject to federal regulation as engaging in interstate commerce. Yet the strikebreakers transported as passengers in traffic between states would nevertheless, on the authority of the *White Slave Act* decisions,[39] seem to be subjects of interstate commerce and hence within the power of Congress to regulate.[40]

That such regulation may take the form of prohibition is also clear.[41] The basic reason underlying the decisions sustaining prohibitions of interstate transportation [42] seems to be that in each such case the use of interstate commerce contributed to the accomplishment of harmful results to the people of other states, and the congressional power over such commerce could be effectively exercised only by prohibiting it.[43]

Nor is Congress to be denied the exercise of its constitutional authority over interstate commerce and of its power to adopt means necessary and convenient to such exercise merely because those means have the quality of police regulations.[44] In fact, such legislation would seem to be justifiable as a supplementary exercise of the police power by the Federal Government within a field which the police power of the states may not touch.[45]

Effect of the Act

However clear the constitutionality of the Act may appear, its probable ineffectiveness seems even plainer. In view of the prevailing attitude of the courts in labor disputes,[46] the terms of the statute seem highly improvident; and it is a safe prediction that as a result of the lack of pains on the part of the legis-

37. Federal Club v. National League, 259 U. S. 200 (1922).

38. Hart v. Keith Vaudeville Exchange, 12 F. (2d) 341 (C. C. A. 2d, 1926).

39. Hoke v. United States, 227 U. S. 308 (1913); Caminetti v. United States, 242 U. S. 470 (1917).

40. Such criminal statutes as the White Slave Traffic Act [36 STAT. 825 (1910), 18 U. S. C. A. §§ 397-404 (1927)] and the present one may also be upheld on the theory that Congress is thereby regulating, not primarily the conduct of the defendant, but the conduct, legal relationships and interests of the carrier, for the purpose of protecting them. See GAVIT, THE COMMERCE CLAUSE (1932) 92.

41. Lottery Case, 188 U. S. 321 (1903).

42. *Ibid.*; Hipolite Egg Co. v. United States, 220 U. S. 45 (1911); Hoke v. United States, 227 U. S. 308 (1913); Caminetti v. United States, 242 U. S. 470 (1917); Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311 (1917).

43. See Hammer v. Dagenhart, 247 U. S. 251, 271 (1918). But *cf.* Whitfield v. Ohio, 297 U. S. 431 (1936), wherein the bounds of this concept are extended to a regulation of interstate transportation of convict made goods amounting to a practical prohibition of their importation into states having laws forbidding the sale of such goods, though there is nothing inherently harmful to the people of other states in such use of interstate commerce. The ratio decidendi was apparently based simply on the economic detriment involved in requiring free labor to compete with forced convict labor. See Fraenkel, *Constitutional Issues in the Supreme Court, 1935 Term* (1936) 85 U. OF PA. L. REV. 27, 47.

44. Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510 (1916); Hoke v. United States, 227 U. S. 308 (1913); Lottery Case, 188 U. S. 321 (1903).

45. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." Taft, C. J., in Brooks v. United States, 267 U. S. 432, 436 (1925).

46. See Hellerstein, *Picketing Legislation and the Courts* (1932) 10 N. C. L. REV. 158; Mason, *Labor and Judicial Interpretation* (1936) 184 ANNALS 112; Sayre, *Labor and the Courts* (1930) 39 YALE L. J. 682.

lators [47] the enforcement of this law will be well nigh impossible. It is not difficult to forecast the glib innocence with which parties will testify that their only intent was to use the imported men to fill the places of striking employees or as guards to protect the strikebreakers of the former class from being harmed by the strikers—without a thought of employing them to interfere with the "right of peaceful picketing." [48]

A more gaping hole in the Act is conditioned by a notion prevalent among many courts that picketing which is peaceful is a *rara avis,* if not a fantasy beyond any belief at all.[49] While this point of view is expressed by only a minority of the courts,[50] even those which do admit the possibility of peaceful picketing and profess to permit its practice are prone to be thoroughly suspicious of its actuality in a given case and ready to allow an injunction to issue against all but the most useless forms of passive persuasion.[51] If the prohibition imposed by the Act is to be inapplicable wherever the intent is to employ persons to obstruct "non-peaceful" rather than "peaceful" picketing,[52] its benefits to labor will prove illusory, indeed.

Moreover, like most statutes which purport to be a boon to the labor unions,[53] the present one depends on the existence of a labor controversy for its applicability.[54] The recognition by a court of a "labor controversy affecting wages, hours, or conditions of labor" within the meaning of this Act is apt to be as lacking in certainty as the determination of the presence or absence of a strike for other legal purposes.[55]

Even were the Act thoroughly enforceable, however, it would by no means deal a death blow to the strikebreaking business as an industry on a national scale. Rather than a serious obstacle to the prolongation of the profession, it would amount only to an inconvenience which would cause the agencies to make purely

47. Or perhaps to render the Act as completely innocuous as possible was an actual aim, for its self-nullifying limitations were at least consciously imposed, whether advisedly or only misguidedly. See H. R. REP. No. 2431, 74th Cong., 2d Sess. (1936) 2: "The bill is carefully limited in its terms. The intent to employ the person transported in interstate commerce to obstruct or interfere with the right of peaceful picketing during a labor controversy is an essential ingredient of a violation of the proposed act. The labor controversy must be one affecting wages, hours, conditions of labor, or the right of organization for the purpose of collective bargaining."

48. See text of Act, *supra* note 1.

49. See United States v. Railway Employees' Dep't of A. F. of L., 290 Fed. 978, 982 (N. D. Ill. 1923); Atchison, T. & S. F. Ry. v. Gee, 139 Fed. 582, 584 (C. C. S. D. Iowa, 1905) ("There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."); Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 436, 83 N. E. 940, 945 (1908).

50. See Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73, 82-86.

51. *E. g.,* Lisse v. Local Union No. 31, 2 Cal. (2d) 312, 41 P. (2d) 314 (1935); Levy & Devaney, Inc. v. Int. Pocketbook Workers' Union, 114 Conn. 319, 158 Atl. 795 (1932); Robison v. Hotel & Restaurant Employees' Local No. 782, 35 Idaho 418, 207 Pac. 132 (1922).

"It is extremely doubtful, in short, whether labor organizations can lawfully engage in any forms of picketing which attract enough public notice to be effective." Cooper, *supra* note 50, at 87.

52. See text of Act, *supra* note 1; *Hearings before Subcommittee No. 1 of Committee on the Judiciary of House of Representatives on S. 2039,* 74th Cong., 2d Sess. (1936) 3 (statement of Senator James F. Byrnes).

53. *E. g.,* Section 20 of the Clayton Act, 38 STAT. 730, 738 (1914), 29 U. S. C. A. § 52 (1927); the Norris-La Guardia Anti-Injunction Act, 47 STAT. 70 (1932), 29 U. S. C. A. 101-115 (Supp. 1936); see *Hearings before Committee on Labor of House of Representatives on H. R. 7698,* 68th Cong., 1st Sess. (1925) 35.

54. See text of Act, *supra* note 1.

55. *E. g.,* Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304 (1917); Gevas v. Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 134 Atl. 309 (1926); West Allis Foundry Co. v. State, 186 Wis. 24, 202 N. W. 302 (1925); see Note, *The Presence or Absence of a Strike*

intrastate recruiting their regular policy. Practically every state has an available supply of the type of men who are potential "scabs" and strike guards, a condition which has already been made manifest by the fact that in those states whose non-importation laws are effective the detective agencies still continue to do a flourishing strikebreaking business.[56]

Moreover, the common use of forces of violence other than the imported bands of the private detective agencies remains untrammeled. The ease with which almost any number of special deputy sheriffs can be locally commissioned to act as strike guards is deplorable.[57] And the ready accessibility, as well as the efficient brutality, of the state police [58] and even the militia [59] in suppressing strikes has in some states made them more popular than private detectives with employers.[60] Not the least attractive of the advantages in the use of public or quasi-public officers is the better than even chance thereby given to the employer of not being held liable by a court for the tortious conduct of such guards.[61]

The ultimate alleviation of the rancor and turbulence which pervade industrial relations in this country will be brought about, if at all, not by throwing useless sops to labor, but by effecting a fundamental change in the point of view which at present is an attribute not only of most courts and local government officials but of the "respectable elements" of society generally. The bitterness and violence in labor disputes which a smarting sense of injustice engenders will commence to disappear only when the forces of security cease to be more readily available to one group than to another and when employees with a grievance or a demand to enforce can rely on such protection as true equality before the law should ensure.[62]

V. J. R.

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as a Factor in the Issuance of Injunctions in Labor Disputes (1936) 84 U. of PA. L. REV. 771.

56. See Levinson, *Strikebreaking Incorporated* (1935) 171 HARPER'S 719, 729.

57. See Carpenters' Union v. Citizens' Comm., 244 Ill. App. 540, 574-576 (1927).

58. See FINAL REPORT OF U. S. COMMISSION ON INDUSTRIAL RELATIONS (1915) 149-150; Butler and Taylor, *Coal and Iron Justice* (1929) 129 NATION 404.

59. See WEST, REPORT ON THE COLORADO STRIKE (U. S. Commission on Industrial Relations, 1915) 107 ff.

60. To the Pennsylvania coal miners the state police are a more familiar and more dreaded sight than the Bergoff or Pinkerton operatives. See Woltman and Munn, *Cossacks* (1928) 15 AMERICAN MERCURY 399; *The Shame of Pennsylvania* (American Civil Liberties Union pamphlet, 1928).

Violence by the police and military authorities is particularly apt to be rampant in a district wherein political control is largely in the hands of private interest—for example, the domination of southern Colorado in 1913-1914 by the Colorado Fuel & Iron Company. See WEST, *op. cit. supra* note 59. Similar conditions were reproduced in the Colorado coal strike of 1928. See *The War on the Colorado Miners* (American Civil Liberties Union pamphlet, 1928) *passim*. Lawlessness of local authorities and police is by no means confined to the mining towns or to the Western mountains, however. See Hard, *America in Passaic* (1920) 22 NEW REPUBLIC 182.

61. See Fagan v. Pittsburgh Terminal Coal Corp., 299 Pa. 109, 149 Atl. 159 (1930) (coal company *held* not liable to striker for false arrest by Pennsylvania coal and iron policemen employed by the company as guards); Ruffner v. Jamison Coal & Coke Co., 247 Pa. 34, 92 Atl. 1075 (1915) (coal company *held* not liable for batteries by deputy constables paid by company). The Pennsylvania Supreme Court favors a presumption that such policemen are acting in their official capacity rather than as servants of their private employer.

The attitude of some other courts is more impartial, however. See Kusnir v. Pressed Steel Car Co., 201 Fed. 146 (S. D. N. Y. 1912) (corporation employing private police officer as armed guard in its plant *held* liable to employee shot by officer in performance of his duties of preserving order and protecting corporation's property); Hudson v. St. Louis Southwestern Ry. of Texas, 293 S. W. 811 (Comm. of App. Tex. 1927) (railroad *held* liable for shooting of picketing striker by state ranger employed by railroad as strike guard, though in violation of instructions).

62. See FINAL REPORT OF U. S. COMMISSION ON INDUSTRIAL RELATIONS (1915) 146-149.