INJUNCTIONS IN LABOR DISPUTES*

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The writ of injunction is always a harsh remedy. It is one which should never be resorted to except in cases where irreparable injury will result unless a restraining hand is put forth to prevent it. It should never be issued except in cases where the law will afford no relief. *** The hardship and the injustice often brought about by the issuing of injunctions by judges in labor disputes has been the subject of discussion for a number of years. The evils arising from such injunctions have been universally recognized. A public sentiment for relief through these years has gradually grown until the universal opinion has crystallized into a demand for legislative relief. ***

DECLARATION OF PUBLIC POLICY

This law¹ starts out by declaring a public policy of the United States in relation to labor disputes. This is the first time in the history of the United States that any attempt has been made to declare, through an Act of Congress, the public policy of the United States in relation to the issuing of injunctions in labor controversies. The object of setting up such a policy is to assist the courts in the proper interpretation of

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*This article is a portion of an analysis of injunctions in labor disputes prepared by Senator Norris when the anti-injunction bill which he sponsored was under consideration by congress.
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¹The Norris anti-injunction bill was recently passed by both houses of congress and signed without comment by President Herbert Hoover.
the law. Such a legislative procedure, so far as labor disputes are concerned, should be of great assistance whenever the law or any part of it comes up for review and consideration by a court and will relieve the question of many of the difficulties which have hitherto existed when a court has been called upon to interpret the law.

Section 1 of the law declares:

"That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act."

This section is really a preamble to the public policy declared in Section 2, which reads as follows:

"In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority, of the courts of the United States are hereby enacted."

If the Act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy, thus declared by the act; and, having in mind this public policy thus declared, he would be able to so construe the various provisions of the Act as to give full effect and validity to the public policy thus declared.

There is no doubt whatever but that the Congress has the constitutional right to declare the public policy of the United States upon any question upon which the Congress has a right to legislate; and, when such public policy is declared, it becomes the duty of all courts to give
INJUNCTIONS IN LABOR DISPUTES

effect to and to carry it out in the enforcement of any law where such public policy has application.

Where Congress has not declared a public policy, it is within the province of the court to decide what the public policy is, but when such public policy has been declared by Congress it is the duty of the court to follow such policy and to decide litigated questions related thereto in accordance with the policy thus declared by Congress. This doctrine has been repeatedly upheld by both State and Federal courts. In the case of People v. City of Chicago (321 Ill. 466-475) the Supreme Court of Illinois said:

"The public policy of a State is to be found embodied in its constitution, its statutes, and, when these are silent on the subject, in the decisions of its courts. The public policy of the State, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which, in the absence of legislation thereon, by the decisions of the courts has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by legislative enactment."

Another case decided by the Supreme Court of the State of Illinois directly on the point was the case of Union Trust & Savings Bank v. Telephone Co. (258 Ill. 202). In that case the Court said:

"While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the State, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service."

The Supreme Court of the United States has several times upheld this doctrine. In the case of McCullock v. Maryland (4 Wheat. [U.S.] 315, 423), the court, speaking through Chief Justice Marshall, said:

"Where the law is *** calculated to affect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Again, in the case of Michaelson v. United States (266 U.S. 42, 68) the Supreme Court expressly upheld the right of Congress to declare the public policy of the United States in the following declaration:

"The words of the act are plain and in terms inclusive of all classes of employment: and we find nothing in them which requires a resort
to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the suppositious exemption on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.”

In the passage of the existing Railway Labor Act, Congress has already established a precedent of proclaiming a public policy by legislative enactment. In the third paragraph of Section 2 of said Act, it is provided:

“Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.” (Par. 3, Sec. 152, title 45, U.S.C.A., 1929 sup.)

In effect, this declaration of public policy in regard to railway employees is the same as the declaration of public policy in the present law in regard to all employees. The constitutionality of the Railway Labor Act has been sustained by the Supreme Court in Texas & New Orleans Railroad Co. v. Brotherhood of Railroad & Steamship Clerks, decided May 26, 1930 (281 U.S. 548). In that case the Supreme Court, through Chief Justice Hughes, declared:

“Evidence in this case supports the conclusion of the court below that the defendant railroad company and its officers were actually engaged in promoting the organization of its clerical employees in the interest of the company and in opposition to the plaintiff labor organization, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926.”

Further on in that case, on page 570, the Supreme Court said:

“Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife, such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.”

In the case of Dayton-Goose Creek Railway v. United States (263 U.S. 456), the opinion of the court shows that the Act was interpreted and was sustained upon the grounds of a public policy declared by Congress. The court, in that case said:
The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. 

To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission.

"Title IV of the transportation act, embracing paragraphs 418 and 422, is carefully framed to achieve its expressly declared objects."

The public policy of the United States in labor disputes, having been thus declared by the Congress, acting under its constitutional right to make such a declaration, it will become the duty of the courts to construe the Act and to enforce it with a view of giving effect to the carrying out of the public policy thus declared.

**THE YELLOW DOG CONTRACT**

In a great many of the injunctions which the courts have issued in labor disputes, the basis for the injunction was a written contract of employment, signed by the employee when he accepted employment. This contract has become almost universally known as the "yellow dog" contract. It requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in the employment; or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quit his employment without giving sufficient notice to his employer to enable him to hire someone to take his place.

Not all of these contracts are the same. Other and similar conditions from those noted are sometimes added, but, in a general way, they all have the same effect. They take away from the laboring man the right to have anything to say about any of the conditions connected with his employment. The employee generally waives his right absolutely to free association and fair representation in connection with his wages, the hours of labor, and any other conditions of employment. This law declares such contracts are:

"* * * contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States."

2 Compare with Wisconsin statutory provision, 103.46, stating—"Every undertaking or promise hereafter made whether written or oral, express or implied, constituting or contained in either: (1) A contract or agreement of hiring or employment between any employer and any employee or prospective employee, whereby (a) either party to such contract or agreement undertakes or promises not to join, become or remain, a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment rela-
It must be remembered that up to this time we have had no statute declaring any public policy on the subject and have had no statute which attempts to outlaw such contracts as these. There is no doubt in my mind but that courts ought to and will follow the declaration of Congress and absolutely refuse to enforce any such contract under this law. In the case of Bailey v. Alabama (219 U.S. 219), the Supreme Court said that one of the objects of the Thirteenth Amendment was:

"* * * to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

In the same case the court said:

"There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

This case was tried by a divided court, two Justices dissenting. Those who opposed this legislation dwelt with a great deal of assurance upon the dissenting opinion in that case, written by Justice Holmes. But a careful reading of Justice Holmes' dissenting opinion will convince any fair-minded man that there will be no conflict between the dissenting opinion of Justice Holmes and this law. The Bailey case was based upon an Alabama statute, and Justice Holmes in his dissenting opinion assumed that the contract under this statute was a legal one because it was made in accordance with the statute which he believed to be constitutional and that, therefore, a man could be legally punished for obtaining money by making such a contract with the fraudulent intention of breaking it. He met the argument that the terms of such contract would result in peonage with the pertinent comment: "If the contract is one which ought not to be made, prohibit it."

In other words, a fair conclusion from the dissenting opinion of Justice Holmes will convince anyone that the legislative power had the right to prohibit the very contract in dispute.

That is what we have tried to do in this law—to declare, by statute a public policy of the United States; that the "yellow dog" contract is

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(1929, C123.)
in conflict with such public policy, and that, therefore, it shall not be
enforced in any Federal Court in the United States. ** **

By the abolition of these unconscionable contracts, this law sets on
the hilltop a beacon of human liberty. It gives to those who toil, to
those who are poor, to those who, by the sweat of their faces, contrib-
ute to the happiness of humble homes—the enjoyment of that freedom
and that liberty which is necessary in every free country for all of its
citizens and not by one class of its people. It gives liberty to the down-
trodden and the poor and, in this respect, puts them on an equality
with those who live in luxury and plenty.

Human liberty, after all, is just as precious to the man who toils
in the darkness of the bottomless mine as it is to the man who controls
a nation or who owns unlimited wealth. It gives hope to the little chil-
dren of those who have no hope if liberty is blotted out. It brings joy
and peace to the humble fireside in the weather-beaten cottage. It fills
the breast with pride and with love of country and of all mankind. Let
me quote one of the most beautiful tributes which has ever been paid
to human liberty by one of the world’s greatest writers:

“We speak of liberty as one thing, and of virtue, wealth, knowledge,
invention, national strength, and national independence as other things.
But, of all these, liberty is the source, the mother, the necessary con-
dition. She is to virtue what light is to color; to wealth what sunshine
is to grain; to knowledge what eyes are to sight. She is a genius of
invention, the brawn of national strength, the spirit of national inde-
pendence. Where liberty rises, there virtue grows, wealth increases,
knowledge expands, invention multiplies human powers, and in strength
and spirit the freer nation rises among her neighbors as Saul amid his
brethren—taller and fairer. Where liberty sinks there virtue fades,
wealth diminishes, knowledge is forgotten, invention ceases, and em-
pires once mighty in arms and darts become a helpless prey to freer
barbarians! ** **”

“In our time, as in times before, creep on the insidious forces that,
producing inequality, destroy liberty. On the horizon the clouds begin
to lower. Liberty calls to us again. We must follow her further; we
must trust her fully. Either we must wholly accept her or she will not
stay. It is not enough that men should vote; it is not enough that they
should be theoretically equal before the law. They must have liberty to
avail themselves of the opportunities and means of life; they must
stand on equal terms with reference to the bounty of nature. Either
this, or Liberty withdraws her light; either this, or darkness comes on,
and the very forces that progress has evolved turn to powers that work
destruction. This is the universal law. This is the lesson of the cen-
turies. Unless its foundations be laid in justice, the social structure
cannot stand.”

THE ABUSE OF THE POWER OF INJUNCTION

One of the indefensible things contained in a great many of the
labor injunctions issued by Federal judges is the enjoining of the
defendants from exercising their legal right under State law, given
them by a State statute. Labor unions usually provide for a fund out
of which benefits are paid to their members when they are out of em-
ployment on account of a strike. The members of the union who are
out of employment are entitled, under the rules of their organization,
to these benefits. They have themselves contributed to this fund. They
have a direct interest in it. The fund is accumulated by dues paid by
the members and the object of it is to assist the members when they
are out of employment in the support of themselves and their families.

Some of these injunctions issued by Federal judges enjoin the
unions from paying their members who are on strike any of the bene-
fits to which they are entitled from these funds accumulated by their
own contributions. But many of these injunctions go still farther. It
is a common thing in the operation of coal mines, for laborers to live in
houses owned by the corporation owning or operating the mines. In-
junctions sometimes go far enough to prevent anyone acting as attor-
ney or agent from giving any legal advice to an employee whom the
company is trying to eject from one of the houses. And very often all
persons are enjoined from furnishing any food or fuel or any other
necessity of life to any one of these defendants who happens to be
living in one of these houses and who is out on a strike. Such injunc-
tions have often resulted in the greatest kind of hardship and misery
suffered by these coal miners.

The anti-injunction law takes away from the Federal courts the
power to issue such injunctions and in the same section (sec. 4) the
law prohibits the issuing of injunctions which restrain employees from

“(f) Assembling peaceably to act or to organize to act in protection
of their interests in a labor dispute:”

It prohibits the issuing of injunctions restraining anyone from induc-
ing, assisting, counselling or advising, without fraud or violence, any
of these things, regardless of whether or not the employee may have
signed a “yellow dog” contract. * * *

It has long been recognized by students of the law and acknowl-
ledged by experts in Government that the power to make a law and the
power to enforce the law should be completely separate and that such
separation is absolutely necessary as a protection against tyranny.
Those who drew our Constitution were careful to keep the judicial
power separate from the legislative power and the administrative pow-
er. But these injunctions do away with all those fundamental principles
of government and they put in the hands of one man the right to en-
force the law, the right to fix a penalty, the right to try those who, it
is alleged, have offended the law thus made and the right to inflict,
whatever punishment they believe should be administered. It was many years ago that the great legal writer, Blackstone, used the following language:

“In all tyrannical government, the supreme magistracy or the right of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty.” (1 Blackstone, 142.)

Pomeroy, an acknowledged authority, in his “Equity Jurisprudence,” has this to say on the subject:

“The courts have thus been required to face such questions as the nature and extent of the capitalist’s rights in the management of his business and of the workingman’s property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his right to secure employment; to determine what limits shall be placed upon individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession.” (Pomeroy, Equity Jurisprudence [4th Ed.] vol. 5, p. 4566, sec. 2018.)

This law makes all such injunctions impossible, and under it this picture of human suffering and human misery brought about by judge-made law will be an impossibility. Wherever it can be done, the law applies equally to organizations of labor and to organizations of capital. Organizations of employees and organizations of capital are treated exactly the same. The law does not protect anyone, whether he be an employer or an employee, from punishment for the commission of any unlawful act, either as against property or as against persons.

Procedure

This law, in Section 7, provides for the procedure which shall be followed in case application is made for a restraining order or a temporary or permanent injunction. It provides that before a temporary or permanent injunction shall be issued, there must be an opportunity for the defendants to be heard and that at such hearing they shall have the right to cross-examine witnesses who testify in behalf of issuing of such an order. The court must also permit the defendants to offer witnesses and to take their oral testimony in open court; and the court is not authorized to issue a temporary injunction after such hearing unless the court finds that unlawful acts have been committed and will be committed unless restrained; that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of re-
lief than will be inflicted upon defendants by the granting of relief; and
that complainant has not adequate remedy at law.

The law also provides that no temporary or permanent injunction
shall be issued unless the court finds that the public officers charged
with the duty to protect complainant's property are unable or unwilling
to furnish adequate protection. The law, however, permits a temporary
restraining order without notice, but in order to secure this, the judge
issuing the order must take the testimony, under oath, of witnesses,
and the evidence must be sufficient, if sustained, to justify the court in
issuing an injunction upon hearing with notice. In other words, a re-
straining order without notice cannot be issued except upon the sworn
testimony of witnesses and that testimony must be sufficient to sus-
tain an injunction in case the same evidence were offered with notice.

This can be no hardship to the complainant in the case. If the plain-
tiff is not able to produce sufficient evidence without notice, certainly
he would not be able to produce sufficient evidence with notice. The
greatest danger of damage comes in cases where restraining orders
or temporary injunctions are issued without any notice to the defend-
ants. This, in effect, takes away the protection with which the law
always tries to surround the defendant by requiring that a summons
be served or a notice given before any judgment shall be rendered
against him. It must also appear, before a temporary restraining order
can be issued without notice, that the giving of the notice would of
itself result in irreparable damage to the complainant's property.

A restraining order without notice shall not be in force longer than
five days. The usual provision for the giving of bond before the issuing
of such temporary order is also provided for. It is also provided, in
Section 8, that no restraining order or injunctive relief shall be granted
to anyone who has failed to comply with any obligation imposed by
law which is involved in the labor dispute in question, or who has failed
to make every reasonable effort to settle such dispute either by negotia-
tion or with the aid of any governmental machinery provided for arbi-
tration.

JURY TRIAL IN CONTEMPT CASES

This law provides that a person charged with contempt for the
violation of a restraining order or injunction shall have the right to a
trial by jury. There is one exception to this, however, and that is where
alleged contempt is committed in the presence of the court or so near
thereto as to directly interfere with the administration of justice. Then
the defendant is not entitled to a jury trial. ** Section 12 of the law
gives to any defendant who is charged with contempt of court the right
to file with the court a demand for the retirement of the judge sitting
in the proceeding in all cases where the alleged contempt arose from an
attack upon the character or conduct of the judge and where such at-
tack occurred otherwise than in open court. When such a demand is 
filed under oath, the judge shall proceed no further, but another judge 
will be designated in the same manner as provided in other cases to 
hear and try the contempt charge.

It will be noted that this section is general. It has no specific rela-
tion to a labor dispute, but is intended to more fully reach the case 
where newspapers have been charged with contempt because it is 
alleged they have made improper remarks in their publications in re-
gard to the conduct of a judge in any case pending before him. The 
conscience of the country was shocked a year or two ago when a news-
paper publisher was hauled into court by the judge for something he 
had said in his paper in the way of criticism. The same person against 
whom the criticism was made sat in judgment. He presided at the trial 
which took place without a jury and the charge was improper conduct 
 leveled against the man who was presiding in the case.

The law does not attempt to relieve any newspaper publisher from 
anything which, under previous laws, would make him liable. But we 
do believe that such publisher ought to have the right to a fair and 
impartial trial before a judge not having a direct, personal interest in 
the outcome of the case. There is no reason why, in such a case, some 
unbiased judge should not sit upon the bench and preside in such a 
trial. There is every reason why the judge who seemed to have been 
offended by what the newspaper stated should not sit in judgment upon 
his own case. This is nothing but common, ordinary justice. It is not 
any legal refinement. It is simply good ordinary common sense and re-
quires no legal ability to recognize its justice. * * *

Conclusion

I believe, therefore, that this law will not only prevent injustices in 
labor disputes, but that its effect will be to place upon a higher plane 
all of our courts and eventually bring faith in and respect for all our 
judiciary tribunals.