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PART 3

EMPLOYMENT AT WILL

Professor Gold

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Chapter 2

Employment at Will

Payne v. The Western & Atlantic Railroad

81 Tenn. 507 (1884)

INGERSOLL, Sp. J., delivered the opinion of the court.

... [T]he declaration of plaintiff is as follows:

"That, on the 16th day of February, 1883, and for many years previous thereto and continually since, plaintiff has been engaged in business as a merchant in Chattanooga, Tennessee, and operating a store on Market street at and near the depot, car-shed, railroad track and yard of the defendant, the Western & Atlantic Railroad Company.... [T]he defendant, the Western & Atlantic Railroad Company, is a large and wealthy corporation, operating and controlling a line of railroad leading from Chattanooga, Tennessee, to Atlanta, Georgia. That said corporation employs a very large number of hands both in and out of Chattanooga.... Plaintiff had built up and was enjoying, on the day and year aforesaid, a large extensive and profitable business with the ... employe of the defendant railroad company both in Chattanooga and along the line of said railroad; he had also built up a large trade along the line of said railroad, both buying and selling goods to persons living along the line of said road, other than employes. The defendant, J. C. Anderson, is the general agent of the defendant railroad company at Chattanooga, having in charge and controlling the employes in Chattanooga, Boyce Station and elsewhere along the line of said railroad. And the said plaintiff further declares that, while so engaged in his legitimate and profitable business ... the said defendant wickedly, unlawfully, fraudulently and maliciously conspired and confederated together out of malice, ill-will and wicked feeling to break up, injure, damage and ruin plaintiff in his business;

and, to that end and for that purpose, they, the said defendants, on the day and year aforesaid, did make, publish and circulate the following scandalous and injurious order, threat, command and paper writing, to-wit:

'FEBRUARY 16, 1883.

'J. T. Robinson, Y.M.—Any employee of this company on Chattanooga pay-roll who trades with L. Payne from this date will be discharged. Notify all in your department. J. C. ANDERSON, Agent.'

"The said J. T. Robinson is and was yard-master in the employ of the defendant railroad company, controlling and having under him a large number of hands. Like orders and commands were addressed and sent to other heads of departments of said railroad; and the same were posted and published by defendants and read and commented upon all along the line of said railroad among and by plaintiff's patrons and customers. Plaintiff further declares that, by reason of said order and command, and other means used by defendants he was brought into reproach, disrepute, suspicion and distrust, and his business broken up and ruined. The employes of the defendant railroad company, deterred and intimidated by the threat contained in said illegal command and order, quit trading with plaintiff because of the illegal and malicious interference, threats and combination of defendants, and his business far and near has been greatly damaged and ruined, to his damage," etc.

If the employes are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employe an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employe's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie even to the employe; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action could accrue either to employe or stranger for breach of contract; for no contract is broken. If the act is unlawful it must be on other grounds than breach of contract, as, that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business.

For any one to do this without cause is censurable and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to

trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And, if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them he might fail in business. On the contrary, my own dealings may be so important that, if I cease to trade with him, he must close his doors.. Shall my act in keeping away a hundred of my employes be unlawful, because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own custom?

Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left, without interference to buy and sell where they please, and to discharge or retain employes at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the employer. He may refuse to work for a man or company, that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or he may yield to the demand and withdraw his custom or cease his dealings, and the obnoxious person be thus injured or wrecked in business. Can it be pretended that for this either of the injured parties has a right of action against the employes? Great loss may result, indeed has often resulted from such conduct; but loss alone gives no right of action. Great corporations, strong associations, and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition, and foster monopolies, and thus greatly injure individuals and the public; but power is inherent in size and strength and wealth; and the law cannot set bound to it, unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity or quality. The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others.

Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may "threaten" to discharge them without thereby doing an illegal act, *per se*. The sufficient and conclusive answer to the many

plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employes. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment. The law leaves employer and employe to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employe may terminate the relation at will, and then law will not interfere, except for contract broken. This secures to all civil and industrial liberty....

But plaintiff says that the defendants *wickedly and maliciously combined and confederated* for the unlawful purpose of causing plaintiff's customers, by means of threats and intimidation, to leave off trading with him; and that the unlawful purpose was accomplished by these means, and thus plaintiff's business was ruined and he caused to suffer great pecuniary loss; and he urges that defendants are liable to damages therefor, because every act done fraudulently or maliciously and for the purpose and with the effect of injuring another in his lawful business gives good cause of action....

If defendants, by means of "threats and intimidations," have driven away plaintiff's customers and thus destroyed his trade, they have injured him by an unlawful act, and are liable to him in damages, whether they did it wickedly and maliciously or not. For it is unlawful to threaten and intimidate one's customers; and the loss of trade is the natural and proximate result of such acts. But "threats and intimidations" must be taken in their legal sense. In law a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is not unlawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense. So too of the alleged conspiracy. A conspiracy is an agreement between two or more persons to do an *unlawful* act. If the act to be done is not unlawful, then the agreement or combination is not a conspiracy....

FREEMAN, J., delivered the following dissenting opinion. TURNEY, J., concurring:

...

It is argued that a man ought to have the right to say where his employes shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and

like cases under the rule we have maintained, the party may always show by way of defense that he has had reasons for what he has done; that the trader was unworthy of patronage; that he debauched the employe, or sold, for instance, unsound food, or any other cause, that affected his employes' usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employe for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold the threat over the employe *in terrorem* to fetter the freedom of the employe, and for the purpose of injuring an obnoxious party. *

Such conduct is not justifiable in morals, and ought not to be the law; and when the injury is done as averred in this case, the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer; an improper and injurious use is all it forbids.

In view of the immense development and large aggregations of capital in this favored country—a capital to be developed and aggregated within the life of the present generation more than a hundred fold—giving the command of immense numbers of employes, by such means as we have before us in this case, it is the demand of a sound public policy, for the future more especially, as well as now, that the use of this power should be restrained within legitimate boundaries. Take for instance the large manufacturing establishments of the country—of which we will in time have our full share, [where] thousands upon thousands of hard-working operatives will be employed. It will be to their interest to have free competition in the purchase of supplies for their wants, and its beneficial influences in keeping prices at the normal standard. The merchant and groceryman and other traders should be untrammelled to furnish these, and the employe untrammelled in the exercise of his right to purchase where his interest will best be subserved. If, however, these masters of aggregated capital can use their power over their employe as in this case, all other traders except such as they choose to permit will be driven away or crushed out, and [the masters] probably alone have a monopoly to furnish their employes at their own rates freed from competition. The result is that capital may crush legitimate trade, and thus cripple the general property of the country, and the employe be subject to its grinding exactions at will.

The principle of the majority opinion will justify employers, at any rate allow them, to require employes to trade where they may demand, to vote as they may require, or do anything not strictly criminal that an employer may dictate, or feel the wrath of the employer by dismissal from service. Employment is the means of sustaining life to himself and family to the employe, and so he is morally though not legally compelled

to submit. Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced; but public policy and all the best interests of society demand it shall be restrained within legitimate boundaries, should be carefully but judiciously guarded. For its legitimate uses I have perfect respect; against its illegitimate use I feel bound, for the best interests both of capital and labor, to protest.

In view of the legal reasons and authorities given, and these elements of a sound public policy, I think the rules I have maintained ... are the better based in all the elements of sound rules of action that will best subserve the public interest, and at the same time do violence to no right that is exercised with a commendable or just motive; for a commendable and proper end will only restrain wrong and prevent conduct that no sound judgment will approve as based on a sound morality.

I therefore think the action *prima facie* maintainable, and the demurrer should be overruled.

Adair v. United States

208 U.S. 161 (1908)

Mr. Justice **HARLAN** delivered the opinion of the court:

This case involves the constitutionality of certain provisions of the act of Congress of June 1st, 1898 [the Erdman Act], concerning carriers engaged in interstate commerce and their employees.

By the 1st section of the act it is provoided: "That the provisions of this act shall apply to any common carrier ... engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water....

The 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th sections relate to the settlement, by means of arbitration, of controversies concerning wages, hours of labor, or conditions of employment, arising between a carrier subject to the provisions of the act and its employees, which seriously interrupt, or threaten to interrupt, the business of the carrier....

The 10th section, upon which the present prosecution is based, is in these words:

"That any employer subject to the provisions of this act ... who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; *or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization* ... is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The present indictment was in the district court of the United States for the eastern district of Kentucky against the defendant, Adair.

The first count alleged "that at and before the time hereinafter named the Louisville & Nashville Railroad Company is and was a railroad corporation.... That before and at the time of the commission of the offense hereinafter named, one William Adair was [a] ... locomotive fireman in train operation and train service for said common carrier ... and at the time of the commission of the offense hereinafter named said O.B. Coppage was a member of a certain labor organization, known as the Order of Locomotive Firemen, as he, the said William Adair, then and there well knew...."

The specific charge in that count was "that said William Adair, did unlawfully and unjustly discriminate against said O.B. Coppage, employee, by then and there discharging said O.B. Coppage from such employment of said common carrier and employer, *because of his membership in said labor organization, and thereby did unjustly discriminate against an employee of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization*...."

... The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of $100....

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that, being an agent of a railroad company engaged in interstate commerce, and subject to the provisions of the above act of June 1st, 1898, he discharged one Coppage from its service *because of his membership in a labor organization*....

May Congress make it a criminal offense against the United States ... for an agent or officer of an interstate carrier ... to discharge an employee from service simply because of his membership in a labor organization?

The first inquiry is whether the part of the 10th section of the act of 1898 upon which the first count of the indictment was based is repugnant to the 5th Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that "in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Massachusetts*, 197 U.S. 11, 29. Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

In *Lochner v. New York*, 198 U.S. 45, 53, 56, which involved

the validity of a state enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employee in such an establishment to work in excess of a given number of hours each day, the court said. "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right...." ...

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.... Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action.... In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who

seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general employment on one side to accept the services of the employee and a general agreement on the other side to render services to the employer,—no term being fixed for the continuance of the employment,—Congress could not, consistently with the 5th Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization.

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employee from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the 5th Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is, within the meaning of the Constitution, a regulation of commerce among the states. If it be not, then clearly the government cannot invoke the commerce clause of the Constitution as sustaining the indictment against Adair.

Let us inquire what is commerce, the power to regulate which is given to Congress?

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph,—indeed, every species of commercial intercourse among the several states,—but not that commerce "completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. In this connection we may refer to *Johnson v.*

Southern P. Co., 196 U.S. 1, relied on in argument, which case arose under the act of Congress of March 2d, 1893. That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes. But the act upon its face showed that its object was to promote the safety of employees and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce, and was calculated to subserve the interests of such commerce by affording protection to employees and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to *Howard v. Illinois C.R. Co.*, 207 U.S. 463. In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and [their] employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the states, but not as to commerce completely internal to a state. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of [their] members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations, as labor organizations, have nothing to do with interstate commerce, as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot, in law or sound reason, depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man, and not as a member of a labor organization, who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the

apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

...

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant, Adair.

...

Mr. Justice **McKENNA**, dissenting:

The opinion of the court proceeds upon somewhat narrow lines and either omits or does not give adequate prominence to the considerations which, I think, are determinative of the questions in the case. The principle upon which the opinion is grounded is, as I understand it, that a labor organization has no legal or logical connection with interstate commerce, and that the fitness of an employee has no dependence or relation with his membership in such organization. It is hence concluded that to restrain his discharge merely on account of such membership is an invasion of the liberty of the carrier guaranteed by the 5th Amendment of the Constitution of the United States. The conclusion is irresistible if the propositions from which it is deduced may be viewed as abstractly as the opinion views them. May they be so viewed?

A summary of the act is necessary to understand §10. Detach that section from the other provisions of the act and it might be open to condemnation.

The 1st section of the act designates the carriers to whom it shall apply. The 2d section makes it the duty of the chairman of the Interstate Commerce Commission and the Commissioner of Labor, in case of a dispute between carriers and their employees which threatens to interrupt the business of the carriers, to put themselves in communication with the parties to the controversy and use efforts to "mediation and conciliation." If the efforts fail, then §3 provides for the appointment of a board of arbitration,—one to be named by the carrier, one by the labor organization to which the employees belong, and the two thus chosen shall select a third.

There is a provision that if the employees belong to different organizations they shall concur in the selection of the arbitrator. The board is to give hearings; power is vested in the board to summon witnesses, and provision is made for filing the award in the clerk's office of the circuit court of the United States for the district where the controversy arose. Other sections complete the scheme of arbitration thus outlined, and make, as far as possible, the proceedings of the arbitrators judicial, and, pending them, put restrictions on the parties, and damages for violation of the restrictions.

I may assume at the outset that the liberty guaranteed by the 5th Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore, in judging of any legislation which imposes restraints or limitations, the inquiry must be, What is their purpose, and is the purpose within one of the powers of government? Applying this principle immediately to the present case, without beating about in the abstract, the inquiry must be whether §10 of the act of Congress has relation to the purpose which induced the act, and which it was enacted to accomplish, and whether such purpose is in aid of interstate commerce, and not a mere restriction upon the liberty of carriers to employ whom they please, or to have business relations with whom they please. In the inquiry there is necessarily involved a definition of interstate commerce and of what is a regulation of it....

From these considerations we may pass to an inspection of the statute of which §10 is a part, and inquire as to its purpose, and if the means which it employs has relation to that purpose and to interstate commerce. The provisions of the act are explicit and present a well co-ordinated plan for the settlement of disputes between carriers and their employees, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the

object of legislative action....

We are told that labor associations are to be commended. May not, then, Congress recognize their existence? yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them,—maybe controls and impels them, whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed,—observed, I may say, not in speculation or uncertain prevision of evils, but in experience of evils,—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. That act did not recognize labor associations, or distinguish between the members of such associations and the other employees of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employees in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid; but how could it be made an aid if, pending the efforts of "mediation and conciliation" of the dispute, as provided in §2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute) be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship, can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

I have said that it is not necessary to suppose that labor organizations will violate the law, and it is not. Their power may be effectively exercised without violence or illegality, and

it cannot be disrespect to Congress to let a committee of the Senate speak for it and tell the reason and purposes of its legislation. The committee on education, in its report, said of the bill: "The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation." And, concluding the report, said: "It is our opinion that this bill, should it become a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage."

With the report was submitted a letter from the secretary of the Interstate Commerce Commission, which expressed the judgment of that body, formed, I may presume, from experience of the factors in the problem. The letter said: "With the corporations as employers, on one side, and the organizations of railway employees, on the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forbearance." And again: "It has been shown before the labor commission of England that, where the associations are strong enough to command the respect of their employers, the relations between employer and employee seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers."

...

Mr. Justice **HOLMES**, dissenting:

I also think that the statute is constitutional, and but for the decision of my brethren, I should have felt pretty clear about it.

...

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the states, as that it interferes with the paramount individual rights secured by the 5th Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of a choice of persons is a

fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word "liberty" in the Amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ; I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

NLRB v. Jones & Laughlin

301 U.S. 1 (1937)

Mr. Chief Justice **HUGHES** delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in