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THE PLIGHT OF A STRIKE BOUND CARRIER

By Charles H. Woods*

Three times within the past five years, the rail carriers have been faced with a nation-wide strike of their employees. On two of these occasions the government seized the roads. In one way or another disaster was avoided, the disputes were settled, the men agreed to go back to work; the roads were returned to their private owners. Whatever may be said about the power of the President, acting as Commander-in-Chief in war time, to take over the railroads for the purpose of stopping a strike, the power of the government in peace time to do so, is open to question.\(^1\)

The Railroad Labor Act\(^2\) proved to be a preventive of serious trouble from its passage in 1926, down to 1936. Since that time its weaknesses, under existing conditions, have been fully disclosed. The plight of the public in the face of a nation-wide railroad strike is self-evident. The plight of the carriers in the face of such a strike is perhaps not quite so well understood.

While these three great threats to our national safety have filled the columns of the press, have attracted the public's attention, and been the subject of much debate, in and out of Congress, another type of labor trouble has arisen during the past ten years, less spectacular, but exceedingly annoying and troublesome to the carriers and quite burdensome to shippers and their customers. These are the cases, more or less confined to a particular territory or city, where, having no labor troubles of their own, carriers find themselves embroiled and dragged against their will into the labor troubles of others. To use the picturesque phrase of Justice Frankfurter,\(^3\) the carriers have been, perforce, brought into the arena of secondary boycotts as "conscripted neutrals."

To illustrate: Because a mail-order house continued to sell Coca-Cola, the striking employees of the bottling company threw a secondary boycott picket line around its plant.\(^4\) Truckers of the city were all unionized, their employees refused to cross the Coca-Cola picket line. This left the mail-order house marooned;

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it entered into a contract with the Railway Express Agency to perform its pick up and delivery service. The truckers' unions then had a real grievance, someone had been found to perform the service which they had refused to do, so, on their own account, they threw out a picket line across the means of access to the mail-order house, and demanded that all truckers and their employees observe it. The contract between the truckers and their employees called for a closed shop, and provided that the employees would not be asked to cross a picket line. The truckers observed their agreement. What would have happened if they had tried something else? Nobody knows, but that the results which could follow might prove disastrous requires no great imagination to perceive.  

A hotel gets into a dispute with its cooks. They strike. This then, involves the maids, the butchers, the mechanics, the grocers, the laundrymen, and finally the draymen who haul trunks, and the express carriers who deliver parcels. These secondary boycotts and sympathetic strikes cause the carriers no end of annoyance, their patrons a great deal of inconvenience, and in some instances lead to serious losses, threatened bankruptcy, and possible deprivation of the right to do business. From time to time and in the particular communities involved, the public may know of these disturbances, and be affected by loss of transportation facilities. But here again, just as in the case of a nation wide strike, the plight of the carriers is not so apparent to the general public.

The purpose of this paper is to point out some of the perplexing problems of common carriers confronted with a strike, and to explain why it is that their efforts to extricate themselves have proved largely unsuccessful. The subject will be discussed under the following arrangement

I. In Equity  
(a) The carrier as petitioner.  
(b) The carrier as respondent.

II. In Law  
(a) The carrier as plaintiff seeking to recover damages.  
(b) The carrier as defendant in suits brought against it for damages.

III. Before the Interstate Commerce Commission.

IV In the Legislature.

5. Ibid.
I.

IN EQUITY

THE CARRIER AS PETITIONER

“No more unusual question has ever perplexed the mind of a Judge,” wrote Judge Murrah in the *North Texas Freight Lines* case.6

Local 886 of the A. F of L. Teamsters' union, having organized practically all of the highway carriers in the territory, decided to move in on the plaintiff, North Texas Freight Lines. At the time only two of plaintiff's employees were members of the Teamsters' Union. Plaintiff had a valid existing collective bargaining agreement covering all of its employees, which had been negotiated under procedure prescribed by the Wagner Act.7 This made no difference; the officers of the Local made demand on the plaintiff for representation and a closed shop. To have complied would have meant repudiation of its existing contract and subjected it to prosecution by the National Labor Relations Board for indulging in unfair labor practices. When the plaintiff refused, the Local ordered a strike, threw a picket line around plaintiff's warehouse, and proceeded to enforce boycotts against plaintiff's patrons and interline-connecting carriers. In a short while, plaintiff had lost sixty per cent of its business.

If Judge Murrah found this a perplexing situation, think how it appeared to the plaintiff. It was a common carrier under legal compulsion, both at common law and under federal and state statutes, to furnish service to patrons and to receive shipments from connecting carriers. If it failed to provide such service, an aggrieved shipper or connecting carrier might file a complaint with the Interstate Commerce Commission8 or with local regulatory authorities. Should a cease and desist order be issued against it, and that order be disobeyed, the carrier might forfeit its authority to do business. Also, it faced the immediate prospect of being transformed from a useful servant of the people, making money, into a ward of the bankruptcy court.

When an appeal to the civil authorities, local and state, brought no relief, the plaintiff went into a federal court and tried to secure an injunction. Here the Norris-La Guardia Act was invoked as

a barrier. Was there a labor dispute? Clearly so, under the definition contained in § 13, the merits of the dispute could not be tried by the court. Were the strike, picket and boycott legal? Clearly so, under the definitions of § 4 of this Act, the union was striving to advance the economic self interest of its members, that its cause of action might result in damage to the employer and cause harm to the public and other employees was irrelevant. So, Judge Murrah closed the door of the equity court, leaving the carrier petitioner to stand on the very cold outside.

Such questions as these continue to perplex the minds of jurists, but they are no longer unusual. The Court of Appeals in the Keystone case,10 said that, while ordinarily the duties of a common carrier are paramount to private rights, nevertheless the Motor Carrier Act does not operate to enlarge the jurisdiction of an equity court beyond the limits imposed on it by the Norris-La Guardia Act. In the Toledo, Peoria & Western R. R. case,12 the Court of Appeals thought that when Congress had imposed certain duties on a common carrier, it could not have intended that it should be denied federal relief from those who would prevent it from carrying out such duties. But the Supreme Court held that the injunctive relief could be granted only when the prerequisites and conditions of the Norris-La Guardia Act had been complied

9. 47 Stat. 70 (1932)
with. An effort to carve out an exception in the case of a carrier under the jurisdiction of a bankruptcy court, likewise failed.13

Thus carriers, through no fault of their own, have been impaled on the horns of a dilemma. Two opposing principles of public policy were causing the trouble. One of these demanded that the carriers serve the public efficiently and without discrimination. The other required that the laborer be left alone to work out his own salvation by economic force if necessary, even though this private warfare should cause harm to others. Neither principle would yield to the other; and no outside force of power or persuasion could be found to resolve the impasse. In such a muddled state the courts of equity felt impelled to keep hands off. Having no remedy in equity, the carriers were in a difficult position.14

In the Northwestern Pacific case,15 the Supreme Court of California clearly perceived the irreconcilable nature of the two conflicting principles, and not being tied down by an anti-injunction statute, approached the dilemma from the viewpoint of broad pub-

13. In re Quick Charge, Inc., 69 F Supp. 961 (W.D. Okla. 1947), rev’d 168 F. 2d 513 (C.C.A. 10th 1948). It will be interesting to ascertain what eventually will happen to the injunction recently (Nov. 29th) granted by Judge George H. Moore, directed against Guy A. Thompson, Trustee in Bankruptcy of the Missouri Pacific, ordering the railroad to send its cars across a picket line and to restore service to a stove factory.


lic interest and general welfare to be determined in each case by the facts and attendant circumstances of that particular case.

Only in a jurisdiction such as this, and in the few cases where the exception proves the rule, can carriers expect any relief as petitioners in a court of equity

**THE CARRIER AS RESPONDENT**

Instead of carriers seeking relief from the handicaps to service which have been placed in their way by striking, picketing and boycotting employees, third persons may seek to compel the carriers to perform their common law or statutory duty. Such suit might be brought for a writ of mandamus or mandatory injunction. The complaint might be filed by a shipper, an interline connecting carrier, or any other interested party, or it might be commenced by the attorney general on behalf of the state. Clearly in such a suit there is presented a cause for action. But what of the carriers' defenses? Here they may fare a bit better than when they acted as petitioners.

In the first place, they will look into the question of the court's equitable jurisdiction. The bar of the Norris-La Guardia statute acts not alone when the carriers are petitioners, but whenever and wherever there is a labor dispute. So, if there is a labor dispute, and in the class of cases we are discussing there always is, the respondent carriers will go free, if the conditions, prerequisites and limitations of the Act have not been met and complied with.16

The net result of such a successful plea to the jurisdiction, however, is to leave the carriers just about where they were. Indeed, the carriers may not care to raise the question of jurisdiction, hoping perhaps that the injunctional orders against them may be broad enough to reach the employees who are the ones actually causing the service disturbance. But the unions themselves will take care that this does not occur, they will intervene, and themselves raise the question of jurisdiction. Such were the tactics employed in the Keystone case.17 So much for the first defense—to the jurisdiction.

But assume, for any reason, that the foregoing plea is not raised, or, if raised, is denied. Then the next question which would

17. Supra note 16.
naturally arise would be. Is this a question for judicial decision, or for administrative determination? Say the charge made against the carriers is a failure to furnish cars, or the improper declaration of an embargo, or discrimination in service as between different shippers. The general rule with respect to this question is that there must be prior resort to the administrative tribunal for a determination of the administrative question involved. This was clearly stated by Justice Brandeis in *Great Northern v. Merchants Elevator Co.*

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be a preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contra distinction to judicial. But ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can only be secured if determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."18

A carrier-labor case in point is *New York Lumber Trade Association v. Lacey.*19 The Supreme Court of New York said:

"For the reason stated, it may be assumed that it is the rule that, ordinarily complaints of unfair practices must be submitted


in the first instance to the Commission. Claim is made by the respondents that the exception to this rule governs here, and that the unfair practice of which complaint is made, is, in reality, a discriminatory enforcement of a fair rule. But manifestly the gravamen of the action is a rule promulgated by the carriers, which is of general application, and that is to deal with shippers only in the event their trucks are manned by union employees. It is the rule itself and not the enforcement thereof which is in issue here."

The Lacey case, incidentally, must be taken as over-ruling the decision of Burgess Brothers v. Stewart, involving some of the same defendants and pretty much the same facts, where an injunction had been granted without requiring resort to the Commission.21

Spiegel Inc. v. The Chicago River & Indiana Railroad Company,22 involved a labor dispute between Spiegel and its employees, a strike and picket line. The railroad declared an embargo to apply to all shipments from and to Spiegel. Spiegel sued the railroad, praying for an injunction and damages. In an unreported opinion of Judge Ulysses S. Schwartz, the court said:

"In the briefs filed and in oral argument two propositions are agreed upon by both plaintiff and defendant, as follows

(1) A common carrier may impose embargoes. These are declarations by a carrier that it will not render service because of some emergency

(2) An embargo is not lawful unless it is reasonable and the question of reasonableness is for the Interstate Commerce Commission."

After reviewing the earlier decisions, the court had this to say

"We know that today there can well be labor situations in which it would be folly to compel a railroad company to supply service to a shipper regardless of consequences. That means that under certain conditions they may refuse such services, or in other words, declare an embargo."

"What is the test to be applied in determining whether the action of the railroad company amounted to an embargo, the question of the reasonableness of which is exclusively within the jurisdiction of the Interstate Commerce Commission? My conclusion is that the proper test is this—Was the embargo the result of an administrative policy which the railroad had pursued in order to serve the public on a reasonably well-founded belief that to do otherwise would mean a disruption of its public service. In this case the averments of the answer reveal that the railroad company

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22. Sup. Ct. of Cook County, Ill., Chancery 46 S. 11876 (unreported)
imposed the embargo in order to prevent the consequences of a strike and the discontinuance of all service to the public. It is not important how many shippers were involved. In a tense labor situation a railroad company might be called upon to decide whether it will declare an embargo against shipments to the United States Steel Co., General Motors, or any one of the vast corporations with which it does business. Number, therefore, is of little importance. The important element in the question of embargo is the effect on the public service and this can best be determined by a single tribunal which can make the decision on a national basis."

If inability to furnish service necessitating the declaration of an embargo constituted an abandonment under paragraphs 18-22 of Section 1 of Interstate Commerce Act, then a different question would arise. But the Circuit Court of Appeals for the Seventh Circuit, in Farmers Grain Company v. Toledo P & W R., took no stock in such a contention, even in such an extreme and long drawn out case as was there involved. The court said (p. 117).

"Appellees urge quite strongly that appellant had abandoned its railroad because, as it appears, the road cannot operate because of unlawful interference of the Brotherhoods, and because of the unlawful refusal of the connecting lines to interchange traffic with appellant. There is no merit in this contention."

Whatever else may be said for or against the opinion in this case, the court on this point was substantially buttressed by authority; non-use alone is not sufficient but must be accompanied by intent, to constitute abandonment. A railroad company does not withdraw from business when it is unable to operate its trains because its men have struck.

If the plea to the jurisdiction should be overruled, and the plea of prior resort to the Commission should be denied, then the carriers would face the issue on the merits of the case. The cause of action alleged would be that they had failed in their common law and statutory duty to furnish service. What of the carriers' excuse for failure to furnish cars, or failure to receive freight, or failure to haul promptly and with dispatch? If the failure in any of these respects has been due to a strike, and if the carrier has acted with due diligence to avoid the consequences of the strike, then the defense is a good one. And this upon the principle that a com-


mon carrier is an insurer only in some respects. In most respects, and especially under a contract limiting liability, the carrier, like other bailees, is only required to exercise due care. It is liable only when negligent—when it fails to exercise the care that an ordinarily prudent man would or should exercise under the circumstances of the case at the time. This rule of ordinary care, usually a question of fact, for the discretion of the chancellor, applies just as well where the departure from duty is occasioned by a strike as by any other cause.

II.

IN LAW

THE CARRIER AS PLAINTIFF

In the Toledo, P and W R. R. case, Mr. Justice Rutledge had said that denying the right of injunction did not mean depriving the carrier of all remedy. Left was the right to sue for damages, and to call on the authorities to prosecute for violation of the criminal laws. Conceding the correctness of this statement as a matter of theory, not much can be said for either of the proposed remedies from the standpoint of practicality or efficiency. Even from a theoretical standpoint, a cause of action would arise only in case the strike was for an illegal purpose, or being for a lawful object was being conducted by unlawful means. What would be an unlawful object, or improper methods would depend upon the law of the state where the damage occurred. The triple damage suits under the Sherman Act, which figured so largely in the development of the law of labor, are no longer available, because labor and labor unions have been freed from responsibility under the anti-trust acts. Because suit would not lie, or because of the


26. Frankfurter, J., in United Brotherhood v. United States, 330 U. S. 395, 422 (1947) said: "Practically speaking, the interpretation given by the court to § 6 (of the Norris-La Guardia Act) serves to immunize unions, especially the more alert and powerful, as well as corporations involved in labor disputes, from Sherman Law liability. For those entrusted with the enforcement of the Sherman Law there may be found in the opinion words of promise to the ear, but the decision breaks the promise to the hope." See Restatement, Torts, §§ 775-816 (1939).
delay, difficulty of securing and collecting judgment, or for whatever reason, carriers have not in the past decade sought to avail themselves of the remedy of a suit for damages.

As to the second remedy, public prosecution, little need be said. In the federal courts, at least, the same state of facts which would prevent equitable relief would equally be a bar to criminal prosecution. Enforcement of the criminal statutes is conceivable in those labor cases where murder, arson, or other destruction of property has been committed, and where public opinion had become sufficiently strong to demand that action be taken.

As a practical matter, neither of the proposed remedies offers much hope for relief, either to the carriers or to the shippers, or the public.

THE CARRIER AS DEFENDANT

While the carrier has not availed himself of the privilege to sue the unions for damages caused by them, there have been a number of suits against carriers by persons who claimed to have been damaged, and where the defense was a strike by the carrier's employees. The first of these cases arose in New York in 1859,27 and the last of the recorded cases was handed down in 1927.28

Suits against carriers have been of three sorts (1) failure to receive freight for shipment, or to furnish cars; (2) failure to transport with proper dispatch; (3) loss and damage in transit. No distinction can be observed in the measure of responsibility of the carrier; in all three of the cases the carrier is held like any other bailee, to the exercise of ordinary care. This requires a word of explanation. While the common law rule applicable to loss and damage to shipments in transit made the carrier liable as an insurer, this no longer obtains, because of the provision of the uniform bill of lading, which has been prescribed by the Interstate Commerce Commission and has the force and effect of law.29

The Uniform Bill reads

"Except in case of negligence of the carrier (and the burden to prove freedom from negligence shall be on the carrier), the carrier shall not be liable for loss, damage, or delay resulting from riots or strikes."

And it is to be observed that in all the cases except the first, failure or refusal to receive, and possibly in the instance of a conversion

by the carrier, the Carmack Amendment makes the initial and delivering carriers liable for all acts of default of themselves and their connecting carriers. This vicarious responsibility applies to delay as well as loss or damage.

This raises the point that Congress, having exclusively occupied the field of regulation and control of interstate carriers through the Interstate Commerce Act, as amended, including the Carmack Amendment, the rule to be applied in the fixing of responsibility for damages due to a strike, is that of the federal courts, not that of the highest court of the state, notwithstanding the decision in *Erie R. Co. v. Tompkins.* This conclusion is reached in *Adams Express Co. v. Crominger* in which the Supreme Court held that the law of the state where the action was brought was not controlling.

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under the bill of lading which he must issue and limits the power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersedes all state regulations or interference with it."

The question may not assume practical importance. Nevertheless, the federal cases will be looked into for the purpose of discovering whether or not there is a federal rule on the subject. A carrier, confronted with a claim that he has refused to receive freight when it has been tendered, or that he has refused to furnish a car when demanded, or that he has failed to handle the shipment with dispatch, or that he has damaged or lost the goods in transit, undertakes to excuse his admitted default by pleading a strike. It may be a strike of his own employees, or those of a connecting carrier, or it may be because of a picket line thrown out by the employees of a third person. What of such a defense?

In the first place, the carrier will look into the question of prior resort. And here, as in the case of equitable relief, if there be an administrative question the court will have to dismiss the case, or stay its hand until the Interstate Commerce Commission renders its determination. There would be such administrative question clearly where the carrier failed to furnish cars, where the carrier

31. 304 U. S. 64 (1938).
32. 226 U. S. 491, 505-506 (1913).
33. 26 Col. L. Rev. 876 (1926). The Commentator here raises a question as to whether there is a distinctive Federal rule.
declared an embargo, or where the carrier was charged with discrimination. There might be others. This preliminary question disposed of, the cases then proceed to the merits.

First. The Rule in the Federal Courts.

The federal rule was established by the Circuit Court of Appeals for the Eighth Circuit, in Empire Transp. Co. v. Philadelphia & R. Coal Co., Judge Sanborn writing the opinion. Libels against the ship company for failure to discharge the vessel promptly, had been dismissed in the lower court, and the libelants appealed. The defense was that in the presence of a strike, the ship company had exercised reasonable diligence. The decision of the lower court was affirmed. The implied contract, said the court, was to unload within such time as is reasonable, in view of all existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of her arrival and discharge. The implied contract to discharge within a reasonable time is, in effect, a contract to discharge her with reasonable diligence. Proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of her delivery, throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his reasonable diligence thereunder. The rule so established has been consistently followed, as indicated by the cases cited in the notes. Admitting that the Supreme Court in the Olivit case may not have hit the nail squarely on the head, it at least found no fault with what the lower court had done. In three of the Circuits the same rule is authoritatively laid down, which the Supreme Court passed over without exception.

It is clear to the writer that there is a federal rule on the subject of the carriers' liability for the consequences growing out of a strike, and that such federal rule would prevail over any contrary state rule. It is equally clear that the rule established by the federal decisions is the general rule of reasonable care under all the facts and circumstances prevailing at the time.

35. Describing them as analogous cases, the court cited Greismer v. Lake Shore & M. S. Ry., 102 N. Y. 563, 571, 7 N. E. 828 (1886), Pittsburgh, Ft. Wayne & C. Ry. v. Hazen, 84 Ill. 36, 38 (1876), Pittsburgh, Cinn. & St. L. Ry. v. Hollowell, 65 Ind. 188, 195 (1879), Gulf C. & S. F. Ry. v. Levy, 76 Tex. 337, 343, 13 S. W. 191 (1890). This decision in the 8th Circuit was followed with approval in Marshall v. McNear, 121 Fed. 428 (N.D. Cal. 1903), In re 2098 Tons of Coal, 135 Fed. 317 (C.C.A. 7th 1905), The Toronto, 174 Fed. 632 (C.C.A. 2d 1909), The Richland Queen,
Second. The Rule in the State Courts.

Time will not permit an analysis of all the many state court decisions. Certain decisions have been selected and given the designation of leading cases. But all the cases are cited in a footnote. On considering these cases, what was said obiter, has been carefully distinguished from what was actually decided, and there has been kept in mind the period in which the judgment was handed down.37

In Greismer v. Lakeshore R. Co.,38 the Court of Appeals of New York laid down, as far back as 1886, the general rule ap-

254 Fed. 668 (C.C.A. 2d 1918) The court in the latter case altogether disapproved of the arbitrary distinction laid down in such cases as Blackstock v. New York & Erie R. R., 20 N. Y. 48 (1859) and Greismer v. Lake Shore & M. S. Ry., 102 N. Y. 563, 7 N. E. 828 (1886), the first holding that a peaceable strike would not excuse, the latter holding that a strike with violence would constitute a defense. Finally, the Supreme Court decision in Pennsylvania R. R. v. Olivit Bros., 243 U. S. 574 (1917), though leaving something to be desired by way of clear cut decisiveness, could not have been decided the way it was had the court disagreed with the principle laid down in the Empire case, and others in the various Federal courts which followed in its wake.


37. It has been helpful to consider the cases in the light of a simple chronological division. The Old Cases, being those decided before 1890, The Middle Period Cases, being those handed down between 1890 and 1932, and The Recent Period Cases, being those decided since 1932. This division is more or less arbitrary, but nevertheless based upon some logical reasoning. See Ronney, Federal Intervention in Labor Disputes, 7 Minn. L. Rev. 467 (1923), Commons, History of Labor in the United States, Vols. 1 and 2. The first period was one when labor disturbances were comparatively rare, of local interest and effect, and strikes were so little known and understood as to require the use of quotation marks when referring to them in the Courts' opinions. There was no permanent, self-conscious labor class, and no stable national organizations giving to members of this class unity of aim and action. The Middle Period was marked by the Pullman strike of 1894, the Engineers' strike of 1911, the Conductors' and Trainmen's strike of 1912, the threatened nationwide strike of 1916, and the switchmen's and shop strike of the early '20s. All of these were national in scope, resulting in the people and Congress becoming very much strike conscious. This was the period of the passage of the Erdman Act, in 1898, the Newland Act in 1913, and the Adamson Act in 1916. Labor disputes and their settlement had become a national issue, to be nationally handled. The discussion passed from voluntary arbitration to some form of compulsory arbitration and prohibition of strikes. The Recent Period is marked by the passage of the Norris-La Guardia Act in 1932, the Wagner Act in 1935, the Wage and Hour Act in 1938. The weight of government was thrown into the scale on the side of labor. Manifestly the judges who wrote the opinions and handed down the decisions reflect their education, environment and class consciousness. The manner of expression and the decisions themselves can only be understood by taking into account the economics, the sociology, the psychology, and the politics that went to make up the unarticulate premise of the judgments rendered. What is reasonable for a carrier in the Old or the Middle Periods would no longer necessarily be reasonable in the Recent Period.

38. 102 N. Y. 563, 7 N. E. 828 (1886).
applicable to a strike, which has pervaded the cases ever since. The
court planted itself squarely on the doctrine of reasonable care.

"In the absence of special contract, there is no absolute duty
resting upon a railroad carrier to deliver goods intrusted to it
within what under ordinary circumstances would be a reasonable
time. Not only storms and floods and other natural causes may
excuse delay, but the conduct of men may also do so. ** The
only duty resting upon the carrier, not otherwise in fault, is to use
reasonable efforts and due diligence to overcome the obstacles thus
interposed, and to forward the goods to their destination."

This then, together with the doctrine of prior resort laid down
in the Lacey case, can easily be said to represent the New York
view: reasonable care under all the circumstances. This would
cause us to lay aside as controlling such adventitious factors as
whether or not the strikers were still employees or had severed
their relations, whether the carrier had made effort to secure other
men, or disciplined the men it had by discharge. All of these factors
and many more would be taken into account and be given con-
sideration when the court or jury came to make up its final verdict,
the final conclusion as to whether, under all the facts and circum-
stances, ordinary or extraordinary, existing at the time, the carrier
did exercise reasonable diligence. Certainly the rigid rule laid down
by the Court in 1859, in the Blackstock case, was substantially
modified or overruled.

Before leaving the Atlantic Seaboard, let us take a look at a
frequently cited case from Maine.

"Some authorities support the Plantiffs' contention that a
'peaceable strike' cannot be a good defense to an action against a
carrier for delay in transporting goods entrusted to it for carriage.
** The opinions in these cases must be based upon one of two
theories:

(1) That one who has been an employee, but who has struck
and refused to return to work, is still an employee for whose
conduct the employer is responsible.

(2) That a common carrier's implied contract of insurance
applies not only to safety, but to promptness of transportation, and
(if applicable to the case at bar) extends not only to goods re-
ceived for carriage, but to those tendered though not received. We
think that neither of these theories is sound. **

For damages caused by mere delay the carrier is responsible
only when it fails to exercise reasonable care."

39. New York Lumber Ass'n v. Lacey, 269 N. Y. 595, 199 N. E. 54
(1935).
note 35 supra for holding.
41. Warren v. Portland Terminal, 121 Me. 157, 116 Atl. 411, 412
(1922).
What is reasonable depends upon the "circumstances of the particular case." The same rule is applicable to freight tendered, and not received, as to freight received and delayed in carriage.

Dropping down to North Carolina, we find the case of *Murphy Hardware Co. v. Railway Co.*, holding that a carrier unable to transport cattle, because its motive power was tied up with a strike, would not be liable for the statutory penalty for its refusal to receive the stock. The Maryland case of *American Ry. Express Co. v. Peninsula Produce Exchange* held the trial court had not erred in refusing to direct a verdict for the express company.

A short quotation from the opinion in a Florida case will be in order.

"When the employees of a carrier by agreement and concert of action refuse to perform their duties to the public which their several occupations require of them, and thus prevent the corporation from functioning, it is none the less a condition over which the corporation has no control. * * * The situation described by the pleas cannot be compared with the case of one employee who, upon his own initiative refuses to work, where his place can be filled by another with sufficient diligence by the carrier to prevent delays in the performance of the carrier's duty."

Moving over to the west we find the same general rule being applied to the furnishing of coal cars by the Supreme Court of Kentucky. And still further west, the Supreme Court of Arkansas said:

"It appears from the record that a switchmen's strike in the City of Kansas City, Mo., caused all railroads which entered the city to refrain from receiving freight from connecting carriers. * * * On account of the embargo on freight consigned to K. C., it did not receive the shipment of hogs in question. The strike was not in any manner induced or caused by appellee. It had nothing whatever to do with it, and the embargo placed on freight consigned to Kansas City prevented it from receiving the hogs for shipment. The testimony on this branch of the case was undisputed, and it follows that under the law above announced, the court was right in directing a verdict for appellee."

In Texas the same view of reasonableness as the test is followed in a long line of cases, topped by *Panhandle & Santa Fe v.*

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42. 150 N. C. 703, 64 S. E. 873 (1909)
44. American Ry. Express Co. v. Johnson, 87 Fla. 451, 100 So. 743, 745 (1924)
45. Louisville & N. R. R. v. Queen City Coal Co., 99 Ky. 217, 35 S. W 626 (1896)
Thompson. Following around the circle of states, we come to Riddle v. Chicago B. & Q. in Iowa, Ritchie v. Oregon Short Line in Idaho, and Hines v. American Fruit Distributors in California, and then to complete the circle, mention is made of Leavens v. American Exp. Co., in Vermont. The English announce the same rule. In all of these cases, what is reasonable under all the circumstances, is the rule which has been applied.

Not all the cases, particularly those in the Old Period, bear the imprint of uniformity in expression. Indeed some of them employ expressions and use language that sound strangely in our ears today. But making due allowance for the strangeness of the terminology, it is believed that throughout most of the cases runs this strong cord—of reasonableness and due care. To what extent the rulings in Georgia and Missouri, when thoroughly analyzed, run counter to the general trend cannot be here gone into. Space will not permit. Statutes in those states may have influenced the result.

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48 203 Iowa 1232, 210 N. W. 770 (1926).
49 42 Idaho 193, 244 Pac. 380 (1926).
51 86 Vt. 342, 85 Atl. 557 (1913).
53 See supra Note 37.
54 The cases selected for comment in the body of the article are, in the opinion of the writer, the leading cases in their respective jurisdictions. Nevertheless, there have been gathered together in this note all the cases. From an examination of these cases, in addition to the ones cited in the text, it is confidently believed that the general rule of due care will receive emphasis—always with a caveat that the early cases were decided in an atmosphere wholly different from that with which we are now confronted. Ark. Johnesbоро, L. C. & E. R. R. v. Maddy, 157 Ark. 484, 248 S. W (1923); St. Louis S. W. Ry. v. Clay County Gin Co., 77 Ark 357, 92 S. W. 581 (1906); Hines v. Mason, 144 Ark. 11, 221 S. W 861 (1920), St. Louis & San Francisco Ry. v. Watts, 168 Ark 804, 271 S. W 464 (1925), Cal. Elliott v. Southern Pacific Co., 145 Cal. 441, 79 Pac. 42 (1904), Foley v. American Ry. Exp. Co., 69 Cal. App. 669, 232 Pac. 169 (3d Dist. 1924).
57 Ind. Pittsburgh, Cincinnati & St. Louis Ry. v. Hollowell, 65 Ind. 188 (1879); Lake Shore and Michigan Southern Ry. v. Bennett, 89 Ind. 457 (1883).
III.

BEFORE THE INTERSTATE COMMERCE COMMISSION

So far it has been seen that, confronted with a strike, a picket line, or a boycott, the chances of carriers securing affirmative relief at the hands of the courts, either in equity or at law, either civil or criminal, were practically nil. It has also been seen that interruption in service from these causes has laid the carriers open to various serious consequences and to actions and proceedings against them, both from the public as a whole, and from individual members. On the purely defensive side the carriers fared somewhat better. They could plead the Norris-La Guardia Act; they could plead the existence of a strike, justifying the laying of an embargo, and if they could show freedom from negligence they would be entitled to a verdict of the jury or a judgment of the court. They could also claim the presence of an administrative question and seek the prior determination of the Interstate Commerce Commission.

Another perplexity besets the carriers. It is to have a complaint filed against them with the Interstate Commerce Commission, or other regulatory body having jurisdiction, alleging failure

Bartlett v. Pittsburgh, Cincinnati and St. Louis Ry., 94 Ind. 281 (1883)  
Mass. White Co. v. Murphy, 310 Mass. 510, 88 N. E. 2d 685 (1942)  
Ala. Alabama & Vicksburg Ry. v. Brichetti, 72 Miss. 891, 18 So. 421 (1895)  
to perform the duty required as common carriers by the statute, asking for a cease and desist order with ultimate possibility of loss of certificate. Such cases have been brought against carriers, and it is the purpose of these paragraphs to briefly examine them. What the Commission has done with these complaint cases gives a fair indication of its conception of the law applicable to strikes, and presages what it would do if called upon to render administrative rulings in any proceeding involving similar facts and circumstances.

The most recent complaint case is that of *Montgomery Ward & Co. v. Chicago M., S., P. and P. Ry.* The strike here was called by a CIO union which represented the complainant’s warehouse and clerical employees. The picket line turned back both truck and rail employees of the carriers, because of the generally threatening attitude of the pickets. The Ward Company’s principal charge of negligence against the railroad was that it made no effort to secure or obtain non-union drivers. The Commission dismissed the complaint saying that it was clear from the testimony that any effort to employ non-union men to break the picket line would have resulted in a strike by the union trainmen, a complete stoppage of traffic with disastrous results to the public.

In deciding the case as it did, the Commission fully recognized the general rule laid down by the courts, that under the common law the carrier lay under no absolute duty to serve. It was only required to exercise the diligence of an ordinarily prudent man under the circumstances. Any effort to secure non-union men under the prevailing agreements and circumstances could only have resulted in failure. Success in obtaining non-union men by the route of disciplining and discharging its union men, and having the non-union men try to run the picket line, would by comparison cause a greater disaster to the public than merely failing or refusing temporarily to serve an individual shipper.

The commission in deciding this case, followed its ruling in *Montgomery Ward & Co. v. Consolidated Freightways,* and distinguished under the fact its previous rulings in *Planters & Chocolate Co. v. American Transfer,* and *Montgomery Ward v. Santa Fe Trail Trans. Co.* In the *Consolidated Freightways,* the Commission said:

55. 268 I. C. C. 257 (1947).
56. 42 M. C. C. 225 (1943).
57. 31 M. C. C. 719 (1942).
58. 42 M. C. C. 212 (1943).
59. 42 M. C. C. 225 (1943).
"We find that the defendant's failure to serve the complainant was primarily caused by a strike at complainant's plant, for which the defendants were not responsible, and that because of the strike they were physically prevented from serving the complainant, and accordingly their conduct was within the limitations and conditions of the applicable tariff with respect to impracticable operation and not unlawful. The relief sought is, in substance, an order to the defendants, commanding them to serve the complainant regardless of their incapacity to do so because of a strike and because of their labor agreements. As the defendants do not control the situation, and as an order could not be directed against their employees, or the union, the practical effect of such an order would be to embroil the defendants in a labor dispute with their own employees, and would merely add to the defendants' difficulties."

Again quoting from the Commission in the *Consolidated Freightways* case

"Common carriers are bound to transport goods promptly, but they are not insurers of prompt transportation. Their duty is that of reasonable diligence. For mere delay not affecting the safety of the merchandise transported, there is no liability if due diligence is proved."

"A common carrier's duty to receive and transport is not an absolute one, but is subject to reasonable limitations and conditions, and it may refuse to receive property for shipment if transportation on its lines, or the lines of a connecting carrier, has become impossible or impracticable because of circumstances beyond its control as for a strike, the strike not being induced or caused by the carrier."

All through the law on this subject, whether before commission or courts, runs the common theme "What is reasonable under the circumstances," and "What is reasonable depends upon the facts and circumstances," and this may be an administrative question. Whether the facts of reasonable care and due diligence are to be determined by a jury in a damage case, acting under instructions of the court, by a court acting through a chancellor to decide whether an injunction shall issue, or by the Interstate Commerce Commission in passing on the administrative question of whether the policy of the carrier is reasonable and in the public interest, the judicial process is the same.

A thoughtful writer in Columbia Law Review,61 writing in 1920, said

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60. The decision of the I. C. C. Montgomery Ward & Co., Inc. v. Consolidated Freightways, Inc., 42 I. C. C. 225, was on quite a different record and state of facts from that involved in Consolidated Freight Lines v. Department, which was upheld by the Supreme Court of Washington in 200 Wash. 659, 94 P. 2d 484 (1939)

61. 26 Col. L. Rev. 876 (1920)
"It seems then that in all his functionings the general rule is that the carrier is bound to use due diligence to avoid causing loss or damage to the shipper; and the courts feel that it is so essential to maintain this duty that as an indirect sanction no effect will be given to a contract clause limiting it. The care and diligence the carrier has to exercise, the lengths to which he has to go are measured necessarily by the position he occupies in the economic system as a public utility, the integral part he plays in the development of the country, the reliance placed upon him by business men and the current sense of economic wastefulness of a given mode of conduct.

"It is at once obvious that the jurisdictions which hold a carrier liable for delays due to a strike, irrespective of care in maintaining service, are departing in this type of case from the general rules as to a carrier's liability. The jurisdictions which excuse the carrier, provided he has used due care to maintain his service during the strike, are obviously attempting to make the scope of his liability as nearly coextensive with general rules as to a carrier's liability as the courts consider feasible."

If the writer of that article had had the benefit of the decisions since 1920, he would have been struck with the greater unanimity now existing.

Consider realities. Must the carrier discharge its employees because they will not go through a picket line? Assuming that he has the power to do so, and that is very doubtful, where will he go to get others?

"Let us suppose," said Senator A. O. Stanley, "that two million men should at the same time and by common agreement, all quit their work at the stroke of the clock. What are you going to do with them? Put them in jail? When you did, when the last railroader is in jail, who would run your railroads?"

The Commission, in these cases, uniformly refused to hold that the carriers were acting in derogation of their legal duty because for a time they failed to serve a shipper. The Commission further declined to consider alone the interest of the individual shipper, but included in its consideration the paramount interest of the whole public. Similarly, in declining to decree specific performance in favor of the Gulf Mobile and Northern, a federal court said.63

"Is the public interest concerned in the instant litigation? Unquestionably, it is. If the full relief prayed for by the plaintiff be granted, and the defendant company is required to permit the

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62. 59 Cong. Rec. 672 (Dec. 16, 1919). The subject matter of debate was compulsory arbitration of labor disputes.
operation of the plaintiff's trains over the former's tracks, manned by the latter's employees, it is evident from the affidavits in the record that a strike vote will be taken by the employees of the Illinois Central Railroad, with the belief expressed under oath by the Railroad Brotherhood chiefs, that a strike will be decreed by the membership of these unions, in which the majority of the employees of both the plaintiff and the defendant hold membership.

"The 6,477 men employed by the defendant railroad have the unquestioned lawful right to strike. This right is guaranteed in express terms in Sec. 2, par. 10 of the Railway Labor Act.

"The lines of the Illinois Central Railroad approximate 7,000 miles of trackage, and extend through 14 states of the Union. A large volume of traffic is, of course, affected by the extensive operation, and many cities, towns, hamlets and communities depend exclusively on this particular railroad for freight and passenger transportation. The moving of the products of farm and factory, and the interchange of commodities are directly involved.

"It requires no elaboration of detail to conclude that the public interest and general welfare is involved in the avoidance of the paralyzing effect of a lawful strike by the employees of a great railroad system, upon agriculture, industry, and commerce, in the consequential damage to myriads of human beings."

If public policy held the hand of the court from granting decree of injunction and specific performance, if public policy restrained the Commission from granting cease and desist orders, then, by the same token, a carrier, acting on its own initiative in the first instance, would be justified in refraining from action that could bring on the same consequences from which the court and Commission drew back.

IV

IN THE LEGISLATURE

Judge Killitts, in the course of his opinion, in Stephens v. Ohio State Tel. Co.,64 said

"Two maxims, which have much the same meaning, are universally treated as controlling all legislation and as limiting all personal rights. They are Salus populi est suprema lex, and, salus republicae suprema lex. Liberally translated they mean that the public welfare is the first and supreme consideration. They are the law of all courts and of all countries. Individual rights universally are and plainly must be subordinated to the public good, and of this principle we have many applications of which the superior quality of the public's interest in the service of a public utility vitally concerning the public welfare is one. Congress must be considered to have legislated in the light of this principle, which must be resorted

64. 240 Fed. 759 (N.D. Ohio 1917).
to as an essential criterion of interpretation of the acts of all legislatures."

When Congress enacted the Labor Management Relations Act—1947, it did not leave its interpretation to the maxims above described, but spelled them out in the very forefront of the law. A common carrier has devoted his property and business to the public interest; that interest is paramount to private property and private interests. A laborer is given the right to organize, and being organized, to further his own good in the area of his proper economic self-interest. Both of these are deemed to be in the public interest. But here again, the overall public interest is paramount to the private interest and the economic welfare of the individual.

When the selfish interest of the grain elevators and the railroads conflicted with the paramount interest of the public, the courts held that the legislatures could regulate and control. Hence the public utility commissions and the Interstate Commerce Act. The same principle applies to labor unions, grown national in scope and powerful in resources of money and men. Clearly the legislatures and Congress can regulate the right to strike, the right to boycott, the right to picket. This statement is made in full recognition of what the Supreme Court has said in the Thornhill case,\(^6\) to the effect that so long as picketing remains peaceful and stays in its own proper area, it is merely persuasion, free speech and as such constitutionally protected.

When the right and duty of a carrier to serve come in conflict with the right and duty of a union to represent its members and advance their interests, and in so doing to employ the weapons of private warfare, the strike, the picket, the boycott, then as a matter of feasibility and practicability, it is the legislature and not the courts which should settle the controversy. Such delicately balanced questions are primarily subjects of legislative determination.

The people have recognized here an intolerable situation. Wholly sympathetic with labor's legitimate aims, they still feel that the public as a whole, is called upon to pay entirely too high a price. And one of these prices has been deprivation of necessary transportation service from its common carrier agencies. This feeling on the part of the people has reached the ears of their representatives both in state legislatures, and, somewhat more slowly, in

Congress, with result that many laws in many states have been enacted having for their object the placing of some limit and condition on the right to strike in the public utility field. Some of these more noteworthy legislative efforts are cited in the footnote, without purpose to make the list complete.\textsuperscript{66} It will suffice to comment briefly on three such efforts.

For the first of these, attention is called to the secondary boycott and sympathetic strike provisions of the Labor Management Relations Act, 1947\textsuperscript{67} Sec. 8(b)(4)(A) makes it an unfair labor practice for a labor organization, or its agents, to engage in a strike, or in a concerted refusal to use, transport, or otherwise handle any goods, articles, materials or commodities, or to perform any services where an object of such strike or concerted refusal is to force any employers to cease using, transporting or otherwise handling the products of any other producer, processor, manufacturer, or to cease doing business with any other person. While the definitions of "employer" and "employee" categorically exclude persons subject to the Railway Labor Act and the employees of such persons, nevertheless the provisions of Sec. 8(b) do cover the acts and activities of all others, and it is the activity of these other employees in the secondary boycott cases that causes most of the trouble to the common carriers.

A violation of Sec. 8(b)(4)(A) can be handled in the ordinary way as an unfair labor practice by the National Labor Relations Board. In addition the Board is required, if a charge has been filed, and if it reasonably believes such a violation of the Act is being carried on, to petition the federal court for a temporary injunction, and in such case the Norris-La Guardia Act will not act as


restraint on the equity powers of the court. A third remedy is provided in Section 303 of the Act, by way of suit for damages in the federal court against any union or union officer who commits these acts.

In an intermediate report filed by Examiner Frederic B. Parkes, 2nd, of the N. L. R. B., dated June 25, 1948, it appeared that six rice mills in Louisiana had filed a charge with the Board, alleging that in the course of a strike by certain of its employees, the Union had placed pickets at or near the mills and across the tracks of the Texas & New Orleans and N. O. T. & M. Railroads. As a result of threats, the train crews refused to cross the picket line because they feared for their safety, both on and off the job. A temporary injunction had been obtained.

The Examiner said:

"Nowhere in the congressional history of the act is there any intimation that Congress did not intend that Section 8(b), sub-sections 4A and 4B, of the Taft Hartley Act, should not apply to a situation such as the instant proceeding, where the railroads, neutral to the primary dispute between the respondent and the complainants, became involved in the controversy through activities of the respondent. On the contrary, the prevailing intent of the statute is to remove such obstructions and to protect commerce from such injury, impairment or interruption. Acceptance of the position advanced by the respondent would remove from the ambit of Sec. 8(b), sub-sections 4A and 4B, the industry possibly most directly and extensively concerned with commerce, namely, the vast railroad transportation system, would violate the clear intent of Congress in enactment of the section, and would to a considerable extent, vitiate the Act."

Should this report be accepted by the Board and approved by the courts, certain questions will be raised, which the carriers will need to ponder.

What in the light of such a decision is the exercise of reasonable care on the part of the carriers to escape from the effect of a strike? What could or should a reasonable man do to obviate the restraint and surmount the hurdle of a strike? Certainly the carriers must take advantage of all available remedies that are found to be reasonably clear and open. Well, here is a remedy. Is it available to the carriers?

The second effort of the people to solve this problem of secon-

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68. Section 10(1) of the Act. For cases issuing such an injunction see Lockhart, The "New" National Labor Relations Act in Operation: First Eight Months, 32 Minn. L. Rev. 663, 725-28 (1948).
69. In the matter of International Bro. of Teamsters v. Rice Milling Co., No. 15 I. C. C. 1, 2, 3 & 4.
dary boycotts in the field of transportation, was accomplished in Texas, by an application of the anti-trust statutes of the state. Activities of a union and its business agent in inducing common carriers not to cross picket lines at freight agency where there was a strike were enjoined as violating the state anti-trust law which expressly prohibited boycott agreements.70

The people of California undertook to solve the problem by way of the "hot cargo, and secondary boycott act" approved by a referendum of the people November 3, 1942.71 Suffice to say that its provisions were quite similar to the secondary boycott provisions of Sec. 8(b) (4) (A) of the Labor Management Relations Act. Although the Supreme Court of California held the act void as applied to the particular facts involved in the case before it,72 the way is still left open for effort along the main lines of the statute.

The Texas anti-trust acts were the forerunners of the Sherman Act, the language being in effect if not literally the same. Here is a pattern for Congress to follow. Should the people so demand all that would be necessary would be for Congress to express its own intent in clear language, indicating what it intends the Sherman Act to cover, rather than, as at present, to leave its purpose to the interpretation of the Supreme Court.

Enough has been shown, it would seem, to demonstrate that the approach to the problem through legislation is possible and practicable. By reference to the 1947 federal act, to the Texas Anti-Trust acts, and the secondary boycott statutes of California and other states,73 a way is indicated by which the will of the people when sufficiently aroused, may be translated into action. When the evil becomes sufficiently acute, when the burden of interrupted transportation becomes sufficiently heavy, the power to effect a cure lies at hand, and is ample for the purpose.

"When the tale of bricks was doubled then came Moses."

**Summary and Conclusion**

In broad terms, the effort has been to set forth the trials and tribulations of common carriers when confronted with a strike and its accompaniments. The further effort has been made to show that, difficult as the carrier's position is, and full of perplexities,
the position of the public dependent upon the carriers for transportation is worse.

The effort of the carriers to help themselves through their own efforts, or by calling to their aid the civil or military authorities, has not generally proven successful under existing law and under present state of public opinion. So, acting or attempting to serve in the affirmative, the carriers are practically helpless.

When put upon the defensive, the carrier fares somewhat better, but even here there is much of uncertainty and confusion. Not so much does this uncertainty exist in the broad principles of law applicable to the situation as in the practical effect of such principles upon the day by day, even minute by minute, conduct of its affairs by the responsible officers of the carriers when confronted by a picket line or boycott. It is easy enough for the courts to say that the carriers through their officers, must act as ordinarily prudent men would act under all the facts and circumstances, ordinary and extraordinary, confronting them at the time. But there is no such “ordinarily prudent man” or “reasonable man” or “average normal man”, nobody to consult in advance. So the carriers and their officers must endeavor to use their best judgment under all the circumstances. When they use that best judgment, in good faith, and with eye single to the best possible public good, they should then be excused, even though their judgment may have proved faulty. But unfortunately this is not yet clearly the law. The result of their conduct must be left to the judgment of a court, and the arbitrament of a jury. The Interstate Commerce Commission seems most nearly to appreciate the realities, to appraise the difficulties, to balance the conflicting principles of public policy, and to apply correctly the remedies that are within its grasp.

Finally, the effort has been made to show that the ultimate remedy for an intolerable situation lies not in the courts, under existing law, not in the Interstate Commerce Commission, under existing limitations, but rather in an enlightened public opinion translated into sane and intelligent legislation. The price of industrial advancement, at the expense of the conscripted neutral, may be too great. Some forms of secondary boycott may have to be banned.74

While this paper has seemed to stress the secondary phases growing out of a strike, rather than the primary labor disputes of

74. Campaign promises to repeal the Taft-Hartley law and the recent elections do not compel change of the foregoing sentence. The President's "State of the Union" message of January 6, 1947, recommended "Prevention
the carrier with its own employees, the latter are not to be taken as insignificant. Far from it, as witness the recent strike of the three Brotherhoods, the Locomotive Engineers, Firemen and Engineers, and Switchmen's Union of America.

Judge Goldsborough in granting a permanent injunction on July 1, 1948, said

"In face of the fact that the unions have had the benefit of the Railway Labor Board, an impartial body, the Mediation Service, an impartial body, the Board of Inquiry appointed by the President, an impartial body, they sent out that notice, which meant that the rail transportation system of the country, at six o'clock on a certain morning, would simply stop.

"The undisputed evidence that 90 per cent of the mail could not be handled and the undisputed evidence that 70 to 72 per cent of the freight and passenger traffic could not be handled, simply means that in a few weeks hunger would stalk the country, the whole economic and political system would be upset, political ideologies which are opposed to the democratic ideology would have an opportunity to engraft themselves here in this country, our influence throughout the world would be done away with and we would become a laughing stock.

"The purpose of the Act, as I said before, was to give labor a comparable bargaining power with capital, but to permit a strike of this kind to take place is an extreme situation which society is not required to tolerate under the Norris-La Guardia Act, and the injunctive process is a proper one to pursue. See In re Debs, 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092. The Court wants to emphasize that the Court is of the opinion that the United Mine Workers case, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884, is controlling. The Court also wants to emphasize the Court's deliberate opinion that the Norris-La Guardia Act does not control a situation where the entire transportation system of the country would be stopped."

Notwithstanding the strength and courage breathed in the foregoing opinion and decision, the theme of this paper is that the nice balance of conflicting principles of public policy should, for the ordinary and general run of cases, be weighed and determined by the legislature, not by the courts.

of 'unjustifiable' secondary boycotts." Senator Morse (R.-Ore.), a liberal and member of the Labor Committee is reported to have said that he will urge certain changes in the Wagner Act, among others. "A ban on certain secondary boycotts. " Arizona Daily Star, Dec. 17, 1948. "What the public demands," he is reported as saying, "and is entitled to demand is fair labor legislation which will check both employer and employee excesses, but which at the same time, will not destroy any legitimate right of either." Charles J. MacGowan, an A. F. of L. leader, is quoted as saying that where stoppages by strikes threaten economic disaster government should have power to interfere. New York Times, Nov. 12.