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Federal Intervention in Labor Disputes

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FEDERAL INTERVENTION IN LABOR DISPUTES

By Marjorie Jean Bonney*

In the fall of 1916 the people of the United States were confronted for the first time with the prospect of a nation-wide strike which threatened to tie up the transportation system of the country. Following a period of national anxiety, during which plan after plan for the peaceful settlement of the dispute was seen to fail, Congress passed the Adamson act which granted the demands of the threatening unions and averted the strike. The fall and winter of 1919 witnessed one of the most disastrous coal strikes that has ever occurred in the mine fields. In October, 1921, a nation-wide strike was again threatened by the transportation brotherhoods and averted only narrowly. A second disastrous mine strike of national import, which involved both the anthracite and the bituminous fields, closed the chief coal mines of the country from April of last year until September. And following close on the heels of the mine strike came the shopmen's strike which is still unsettled on 135 railroads. The increasing frequency of threats of national railroad strikes; the general discomfort and inconvenience caused the public by the strikes of individual railroad crafts, and the realization of the national suffering which results from a nation-wide coal strike, make the question of the power of the federal government to intervene and prevent strikes of such a disastrous nature, one of vital importance.

It is therefore, the purpose of this paper, first to present the extent to which the federal government has already developed its powers of intervention, and second, to investigate what further measures it can adopt to insure the nation against the strike danger.

I

The Arbitration Act of 1888, the Erdman Act, and the Newlands Act

The survey of the development of federal intervention in railway labor disputes will entail a study of the policy of the government toward this type of dispute from 1877 when it first took cognizance of the strike danger, through 1888, 1898 and 1913

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when the corporation was more feared than the labor union, up to 1916 and 1920 after it was realized that a definite shift of power from capital to labor had taken place. The policy of the government in these years is exemplified, with the exception of 1877, in federal acts dealing with the railroad strike problem.

At the outset of such a study it is important to note that there was no national labor problem calling for federal intervention before 1877. The question arises, why did this not become earlier a national problem? And the answer is found, first, in the lack of a permanent, self-conscious laboring class, and secondly in the lack of stable national organizations giving to members of this class unity of aim and action.[1] Not until there is a self-conscious, wage-earning class definitely united into national organizations can there be a permanent national labor problem; a problem which calls not for intermittent federal cognizance, but for a permanent constructive policy.

We find that the labor problem does not become national with the railroad strikes of 1877. The approach of the national status of the problem is merely foreshadowed by the disturbances of this year. The rail strikes of 1877[2] may be said to mark an intermediary stage in the development of the labor question from a local to a national problem. For the first time in the history of the country the effects of a labor strike were seriously felt over more than one state; for the first time agencies of the federal government had been interfered with, and for the first time federal troops were called out to suppress a labor strike. The strike, however, did not have back of it a national organization, nor was it yet recognized as presenting a permanent national problem. The president intervened, not because he saw in the labor uprisings a national problem with which the federal government was obliged to deal,[3] but because he was requested by the states as

[1]For an analysis of the growth and history of the labor movement see Commons, History of Labor in the United States, Vols. I and II. Vol. I traces the development of the labor movement from the colonial period up to the period of nationalization in 1860. Vol. II carries on the history from 1860 to 1918. These volumes deal with "the background which explains structure, policies, results and problems."

[2]These strikes started on the Baltimore & Ohio road at Martinsburg, W. Va., and spread rapidly over fourteen states. A description of these strikes is given in McNeill's The Labor Movement of Today. Good accounts are also given in the magazines of this period. An article by Thomas A. Scott in the North American, September, 1877, The Recent Strikes, contains a good description of the 1877 disturbances.

[3]Contrast the action of President Hayes in dealing with the rail strikes of 1877 with the action taken by President Cleveland in the Pullman strike of 1894. Infra, p. 472.

provided in the constitution, to suppress domestic violence. Nor were the people aware that a permanent labor problem had arisen. They did not regard the organized strike as a menace; they feared, rather, unorganized rioting which involved widespread destruction of property. It was the duty of the government to protect property against violence that was here stressed rather than its duty to aid in the amicable settlement of disputes. The Nation, editorially, expressed this attitude when it said, "Society does not owe any particular rate of wages to anybody. It owes protection of life and property and personal rights to its members and nothing more."[4] The proposals of the time urged, therefore, better means of protecting property from violence and better organization of federal and state military forces. It was the cities that listened to these proposals, and the chief effect of the rail strikes of 1877 was a strengthening of the local militia.[5]

If the railroad strikes of 1877 foreshadowed the approach of a permanent labor problem, the great southwestern strike of 1886[6] announced its arrival. For in this strike, which was the first organized railroad dispute of serious import, was clearly demonstrated the dangerous possibilities of repeated clashes of interest between organized railroad labor and arrogant railroad companies. Congress at last recognized the problem as one which could not be settled by federal troops and state militias, and therefore began to consider what action it could take to avert similar disturbances. The result was that in 1888 Congress passed a voluntary arbitration act[7] and thus inaugurated the federal policy of dealing with the railroad labor problem through voluntary boards.

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[4]25 Nation 85.

[5]25 Nation, 85, "The inefficiency of the militia showed the need of a reliable basis of operation for the troops, and the construction of numerous and strong armories in the large cities dates from 1877." 2 Commons, op. cit. 191.

[6]This strike was on the Jay Gould lines, and was spoken of as "The greatest and most memorable railroad strike in the United States." It was called by the Knights of Labor March 1, became general on March 8 and dragged on until May 4, when it was officially called off. A detailed account of the strike is contained in the report, "The Great Strike of 1886," which was made by the Bureau of Labor Statistics and Inspection of Missouri in 1887.

[7]Three bills were presented to the house and one to the senate between March 22 and March 31, 1886, and one providing for voluntary arbitration was passed by both houses of the 49th Congress, but failed to receive President Cleveland's signature because it lacked a provision giving initiatory powers to the government. Cleveland outlined the type of arbitration he favored in his message of April 22, 1886. Cong. Rec., 40th Congress, first session, April 22.

The arbitration act of 1888[8] was broad in its scope, applying to all controversies between interstate transportation companies and their employees.[9] It invested the arbitrators[10] with the power to subpoena witnesses and require the production of papers,[11] but it gave them no power to enforce the awards which they were authorized to make. The act provided, merely, that the decision of the arbitrators be publicly announced and then filed with the United States commissioner of labor.[12] The fear of contravening public opinion would be, the legislators thought, sufficiently strong to induce both sides to abide by the award.[13]

Ostensibly this act was highly favorable to labor; for labor, whose bargaining power was, in 1888, materially weaker than that of capital, was then strongly in favor of arbitration while capital, on the other hand, as strongly opposed it. These two attitudes were demonstrated in the southwestern strike, for in this dispute the unions had made repeated appeals for arbitration, and the companies had as repeatedly refused it.[14] It would seem, therefore, that any act providing for arbitration would be to labor's advantage. Actually, however, labor gained very little. For the settlement of labor disputes by arbitration under the act was practically foredoomed to failure, by the condition included in the act, that boards could be established only after both sides had agreed to the proposal to arbitrate.[15] The attitude taken by the roads in 1886 was proof of the unlikelihood that this dual acceptance would ever be secured. The congressmen were aware

[8]25 Stat. at L. 501-04.

[9]25 Stat. at L. 501, sec. 1.

[10]The arbitrators provided for by the act were three in number. One was to be chosen by the employees, one by the railroads, and the third by these two. No provision was made for the choice of the third arbitrator in case the other two failed to agree. See Erdman act footnote 33.

[11]25 Stat. at L. 502, sec. 2.

[12]25 Stat. at L. 502, sec. 3.

[13]Note statement of Representative Osborne: "There is one tribunal before which the highest in the land will bow in humble submission, and that is the tribunal of public sentiment. No man, no body of men can any more withstand the breath of public sentiment than they can blow away with a breath the mist that comes up from the Ocean." Debate on Act of 1888, 49th Congress, first session. Cong. Rec. p. 3021.

[14]Report, "The Great Strike of 1886." It is also interesting to note here that labor was at this time petitioning federal and state legislatures to pass arbitration measures. Note resolution from a local assembly of Knights of Labor read by Rep. Glover in Congress in 1886: "We call upon our legislatures . . . to enact such measures as will compel the recognition of labor organizations and compel corporations to arbitrate differences between themselves and their employees." Cong. Rec. 49th Congress, first session, p. 2973.

[15]Arbitration boards could be established only by the joint, voluntary action of the two parties. See footnote 10.

of this inherent weakness in the bill, but were not yet prepared to bring any form of compulsion to bear on the railroad companies.[16]

"If this measure fails," said Representative O'Neill, however, "with the strong arm of the government we must take these giant corporations by the throat and tell them they must yield to arbitration; they must submit to some peaceful means of settlement."[17]

At first glance, therefore, the arbitration act of 1888 appears to be an entirely futile measure. The act contained one clause, however, which might have redeemed it from ineffectiveness had the government not been hesitant in employing it. This was the clause providing for the creation of a temporary body of three commissioners[18] authorized to investigate labor disputes upon the motion of the president, or upon the application either of the parties to the controversy or of the executive of the state in which the dispute occurred.[19] Interest attaches to this provision for it marks the only appearance of compulsory investigation[20] in federal arbitration acts until 1920.

For six years this act remained inactive on the statute books. And in 1894 when the first attempt to utilize it was made, it entirely collapsed. In this year the Pullman strike occurred.[21] Arbitration proved impossible under the act of 1888 since George Pullman against whom the strike was called, insisted that he had nothing to arbitrate; and the compulsory investigation clause accomplished nothing because it was not called into operation until a month after the strike began, and the commission did not report until after it was ended.[22] The report of the commission and its

[16]"I know," said Representative O'Neill, in presenting the arbitration bill in the 49th Congress, "that the workmen are willing to arbitrate, (in the strike of 1886) and I know that the president of that vast corporation, (the Gould line), has not yet consented to do it. . . . We feel, however," he continued, "that all we can do at this time is to invoke the public opinion of the country in the existing dispute . . . to compel the parties on both sides to appeal to reason." Cong. Rec., 49th Congress, first session, p. 2960.

[17]Cong. Rec., 49th Congress, first session, p. 2959.

[18]The president was authorized to appoint two of the commissioners, one of whom was to be a resident of the state in which the controversy occurred. The commissioner of labor was designated to serve as the third commissioner. 25 Stat. at L. 503, sec. 6.

[19]25 Stat. at L. 503, sec. 6.

[20]Compulsory investigation is not here used in the technical sense. There was no provision in the act of 1888 requiring the maintenance of the status quo pending the investigation.

[21]The best account of the action taken by the government in the Pullman strike is contained in Ex-President Cleveland's Presidential Problems, Chapt. II, The Government and the Chicago Strike.

[22]The report of the commission is contained in Senate Document, 53rd Congress, third session, Serial 3276.

recommendations were, however, of aid in drawing up the next arbitration act.

The federal government, deprived of the assistance of the arbitration act, was obliged to look about for other means of bringing to an end the strike, which was seriously obstructing the mails. Its first action was to issue warrants under the criminal statutes[23] against persons who had participated in the obstruction. Finding this action ineffective, Attorney-General Olney authorized the district attorney of the northern district of Illinois to secure the issuance of a sweeping injunction against Eugene Debs, president of the American Railway Union, other officers of the Union, and those persons participating in the obstructions.[24] The injunction, issued July 3, was read to a mob of between two and three thousand strikers and was met by jeers, howls and further obstruction. President Cleveland immediately ordered troops to Chicago, and the federal government followed up this action July 10 by arresting Debs and the other officers on criminal indictments. These officers of the American Railway Union were arrested a second time July 17 for disobeying the injunction of July 3, and the strike was practically broken. The federal troops were recalled July 20.

The federal action taken in 1894 differs from that taken in 1877.[25] President Cleveland sent the federal troops to the strike scene, not to quell domestic violence, as did President Hayes, but to protect the United States mails and interstate commerce and to enforce the orders of the federal courts. He sent troops not only without the request of Governor Altgelt, but actually over his protest. The president based his right to do this on sections 5298 and 5299 of the revised statutes. The former provided that it should be lawful for the president, when the laws of the United States, because of illegal obstructions, became unenforceable by ordinary judicial proceedings, to employ land or naval forces to execute laws; and the latter provided that it was the duty of the president "when obstructions . . . existed in a state and state authorities were unable, or failed or refused to protect the rights of the people," to employ the land or naval forces, or to use

[23]Revised statutes, sec. 3995, provides a fine not to exceed $100 for persons who knowingly or willfully obstruct the mails.

[24]Attorney-General Olney "suggested" to special counsel that it might be well to apply to the courts for an injunction instead of relying wholly on the criminal statutes. He relied on the commerce clause and the Sherman Anti-Trust act for this action. Cleveland Presidential Problems.

[25]See supra, p 468.

"any other means necessary" for the suppression of domestic violence. Such obstructions clearly occurred, and hence, under the provisions of these statutes, it was not only legal for President Cleveland to call out the troops, but his duty as well.

The use made of the injunction in the Chicago strike calls for special comment since the case of *In re Debs,*[26] which arose out of the arrest of the president of the American Railway Union on a charge of contempt, established conclusively the right of the federal government to intervene with the injunction to prevent conspiracies[27] which interfered with interstate commerce or the mails. The lower federal court[28] based the power to issue the injunction solely on the Sherman Anti-Trust Act, but the Supreme Court, in reviewing the case, rested it on the broader ground that the federal government had full power over interstate commerce and the mails, and in the exercise of this power could "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the mails."[29]

By 1894, therefore, the federal government had established its right to intervene unsolicited in labor disturbances interfering with interstate commerce or the mails by one of three methods. It could institute investigations; it could call out the federal troops, or it could issue injunctions. None of these methods were, however, wholly satisfactory. Investigations had proved useless in the recent strikes; federal troops could not be called out before the dispute was actually in progress, and the injunction did not prove effective when directed against large numbers of strikers.[30] It is not surprising, therefore, that at the conclusion of the strike of 1894 Congress turned its attention to strengthening the provisions of the Arbitration Act of 1888.

The result was the Erdman Act, which became law June 1, 1898.[31] This act, not exceptionally strong itself, is superior to the act of 1888 which it repealed. It took a long step forward by providing for mediation and conciliation which was to precede

[26](1895) 158 U.S. 564, 39 L.Ed. 1092, 15 S.C.R. 900.
[27]The Pullman strike, it should be noted, was a sympathetic strike.
[28]United States v. Debs, (1894) 64 Fed. 724.
[29]For full discussion of the injunction see infra, Chapter II.
[30]Another weakness in the power of the injunction over strikes was that the injunction could not restrain strikes the purpose of which was the betterment of conditions of employment. This phase did not enter into the case of In re Debs, however, because the Pullman strike was a sympathetic strike. This phase of the equity power is discussed in Chapter II, infra.
[31]30 Stat. at L. 424-28.

arbitration wherever possible. The chairman of the Interstate Commerce Commission and the commissioner of labor were named by the act as mediators and were authorized, on the application of either party, to get in touch with the other party and to attempt an amicable settlement of the dispute.[32] This provision, which was destined to become the most important provision of the act, was considered very lightly by the legislators, who devoted the burden of their discussions to the arbitration proceedings.

Arbitration proceedings under the Erdman Act, like proceedings under the earlier act, could not be instituted until both sides had agreed to arbitrate.[33] After arbitration had been agreed to, however, the provisions of the 1898 act were more stringent. Under this act the parties in agreeing to arbitrate were obliged also to agree not to strike or lock out pending the award and to abide by the terms of the award for one year.[34] It was made unlawful, for three months after the award, for an employer to discharge a workman, or for a workman to quit his employment without giving thirty days' written notice.[35] And finally, the award was made enforceable in equity.[36] An important proviso prohibited the issuance of the injunction to compel the performance of personal service.[37] This proviso makes it evident that the teeth in the act were intended for the corporations.

The Erdman Act, however, possessed weak points. In the first place its scope was limited to disputes affecting employees who were engaged in train operation.[38] In the second place neither mediation nor arbitration proceedings could be instituted without the coöperation of both sides; the mediators were given no power to intervene on their own initiative nor could either party be compelled to request mediation; and in no case could an arbitration board be established without the coöperation of employers

[32]30 Stat. at L. 425, sec. 2.

[33]Arbitrators were named under this act in the same manner as they were under the act of 1888. See supra, footnote 10. It was provided, however, that in case the two arbitrators chosen by the two parties failed to agree on a third arbitrator after five days, the commissioner of labor should then name the third arbitrator.

[34]David A. McCabe, Federal Intervention in Labor Disputes under the Erdman, Newlands and Adamson Acts, 7 Pro. Acad. Pol. Sci. 94.

[35]30 Stat. at L. 427, sec. 7.

[36]Appeals were permitted under the act, first to the U. S. circuit court, then to the circuit court of appeals, where the decision was final. 30 Stat. at L. 426, sec. 4.

[37]30 Stat. at L. 425, sec. 3.

[38]This left outside of the jurisdiction of the act shop-men. car-workers, freight handlers, clerks, etc. 30 Stat. at L. 424, sec. 1.

as well as of the employees. "The employer," said Commissioner of Labor Neill in 1912, "is as free to resort to a lockout and the employees to inaugurate a strike as if the Erdman Act had never been passed."[39] It is important to note also that the compulsory investigation clause of the act of 1888 was left out of the Erdman Act.[40]

The Erdman Act was not immediately successful. The first attempt to utilize its provisions, made a year after its passage, resulted in a complete failure.[41] The railroads in repudiating arbitration in this year, refused to "abdicate" their "vital prerogative" of determining wages "to a special and transient committee of three arbitrators," and while expressing "highest respect" for the commissioners, and confidence in their "ability" and "impartiality," felt that they "ought not, and cannot rightfully, relinquish their duty to determine that question, (of wages)."[42] For seven and a half years following this failure no attempt was made to call into action the clauses of the bill.[43]

The year 1906 marked the beginning of a period of great activity under the act. During the ensuing seven years the mediation and arbitration provisions were invoked in sixty-one controversies;[44] and during this entire period "there was no case of a serious strike, or danger of a serious strike on the part of those employees to whom the law was made applicable, in which the provisions were not invoked."[45] And, surprising as it may have been to the authors of the act, it was the mediation clause which functioned in the majority of these cases. Twenty-eight cases were settled by mediation, eight by mediation and arbitration, and only four by arbitration alone.[46]

The success of the Erdman Act, however, it is important to note, was not due in the first instance, to its superiority over the act of 1888, but to a change in the attitude of the railroad managements toward arbitration. For in 1906 it was not the

[39]1912 Bulletins, Department of Labor, Mediation and Arbitration of Railroad Disputes in the United States.

[40]This clause had functioned just once under the act of 1888. See supra, p. 471.

[41]1912 Bulletins of Department of Labor section on History of the First Attempt to Utilize the Erdman Act.

[42]Ibid.

[43]1912 Bulletins. The antagonistic attitude of the road toward arbitration in this period explains the disuse of the act in this period.

[44]Ibid.

[45]William Chambers, American Experience in Settling Labor Disputes, 7 Acad. Pol. Sci., Pro. 1.

[46]Ibid.

employees, disgusted at the failure of arbitration in 1899, but the company that sought mediation, and it was not until February 27, 1908, after seven other cases had been settled, that labor requested the intervention of the federal board.

The sudden change in the attitude of the railroads toward arbitration was a direct result of the extension of the scope of the labor controversies which followed the adoption, in 1907, by the brotherhoods, of the policy of concerted movement in presenting their demands. In this year the first concerted movement of railroad employees was inaugurated by the conductors and trainmen in the western territory,[48] and in 1910-11 similar movements were engaged in by the firemen in the western territory, by the conductors and trainmen in the eastern territory, and by the Brotherhood of Railroad Engineers.[49] Coincident with the increased strength which labor gained from unified action came less zeal on the part of the employee, and more zeal on the part of the employer to submit to arbitration.

As labor controversies extended over wider areas, the feeling grew that the Erdman Act, enacted in a period when disputes were restricted to individual roads, was inadequate to meet the new conditions. The roads, particularly, expressed a dislike for submitting demands affecting a vast mileage to boards of three men, and because of this aversion, refused, in the engineers' strike of 1911 to seek the intervention of the federal mediators.[50] It was only through the extra-legal action of the federal mediators who intervened unsolicited and induced the parties to submit their dispute to a non-governmental board of seven that a serious strike was averted.[51]

Instead, however, of taking this narrowly averted strike as a warning that the act of 1898 needed revision, Congress waited until a concerted movement by conductors and trainmen, involving

[47]Report of the Commissioner of Mediation and Conciliation for the years 1913-1919. Joint requests were made 18 times and in one case the mediators without legal authority, intervened on their own motion.

[48]This controversy involved 38 roads and 42,000 men. The mileage involved was 101,500. Prior to this time the greatest mileage involved had been 5,800. Ibid., Appendix, Table 3.

[49]An account of these early concerted movements is given in an excellent article, Locomotive Engineers' Arbitration: Its antecedents and its Outcome, by William J. Cunningham, 27 Q. J. of Econ. 12.

[50]For a brief discussion of the Engineers' Strike of 1911 see article by Cunningham cited, footnote 49.

[51]The results of this arbitration were unsatisfactory to labor. The fact that this board advocated compulsory arbitration turned labor definitely against arbitrations under non-governmental boards.

practically all of the railroads in the eastern territory, threatened a disastrous strike, and then, at the urgent request of the president, hurriedly passed the Newlands Act[52] which had been drafted by the railroad men, employees and members of the National Civic Association.[53] It should be noted that in this controversy the employees favored arbitration. They refused to arbitrate, however, under a non-governmental board, and the railroads refused to arbitrate under the Erdman Act unamended. It should also be noted that the Erdman Act failed in the 1912 emergency, not because of any defect in its mediation provisions, but because of dissatisfaction with the arbitration machinery.

The Newlands Act, passed as an emergency measure to provide a mode of arbitration acceptable to the roads and the men and thus avert a strike, has the distinction of being the first federal act which had the sanction of both labor and capital. It amended the Erdman Act in two important respects.[54] It provided for the arbitration board of six contended for by the roads,[55] and created a permanent board of mediation and conciliation of three members[56] which was given the right to intervene on its own motion "in any case in which an interruption in traffic is imminent and fraught with serious detriment to the public interest."[57] The creation of this permanent board of mediation, endowed with the power to offer its services unasked, was a distinct step in the right direction. Mediation which had been provided for more or less incidentally by the Erdman Act, had risen to a place of prominence by 1913, while arbitration, with which the Erdman

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[52]38 Stat. at L., 103-10.

[53]Report of the Commissioner of Mediation and Conciliation for 1913-1919.

[54]Several minor amendments were made. The arbitration machinery was improved by section 4 which provided that the parties to the arbitration, in their agreement to arbitrate, themselves fix the duration of the award, and also specify the period, after the beginning of the hearings, within which the board should file its award. If this period were not fixed, the act provided that that award should be filed thirty days after the beginning of the hearings. The Erdman Act had arbitrarily fixed the duration of the awards at one year, and had made no provision for preventing long drawn out arbitration proceedings. Another amendment of the Newlands Act provided that arbitration boards could be reconvened to construe awards.

[55]Despite the fact that the railroads insisted on six-member arbitration boards, it is interesting to note that the boards of six members have been used only in one-third of the cases under the Newlands Act, and the greatest difficulties over awards have arisen over awards of six-member boards. Report of Commissioner of Mediation and Conciliation, 1913-1919.

[56]38 Stat. at L. 105, sec. 11.

[57]38 Stat. at L. 104, sec. 2.

Act had been chiefly concerned, had been little used. When Congress, then, in the Newlands Act placed the greater emphasis upon mediation, it was applying the lesson it had learned from seven years' experience in dealing with labor disputes. Of the total number of cases settled under the Newlands Act, 70 were successfully adjusted by mediation. In only 21 cases was it found necessary to resort to arbitration.[58]

When the Newlands Act failed in 1916 it failed, as did the Erdman Act, because one of the parties was dissatisfied with the arbitration machinery. In this year it was the employees who looked with disfavor on arbitration and refused to submit their dispute to a government board. When Congress in 1920 drew up a new act for the settlement of labor disputes it ignored the lessons taught by the Erdman and Newlands Acts. Instead of strengthening mediation[59] which had functioned successfully in 98 cases, it turned toward arbitration which had twice been responsible for the breakdown in emergencies of federal labor acts. This later phase of the problem will be discussed in Chapter III.

II

Executive and Judicial Intervention in Labor Disputes

Under the arbitration acts discussed in the foregoing chapter, the federal government can intervene only in railroad disputes which involve employees engaged in interstate transportation. What of its power to intervene in disputes, such as those involved in mine disputes, which fall outside of this category? We have already seen that in two contingencies the federal troops may be used. They may be used, first, if the president is requested to quell domestic violence,[60] and secondly if agencies of the federal government are interfered with.[61] This mode of intervention, however, cannot be called into action until the violence or the interference has become an actuality. Three other methods are at the command of the federal government. These are the in-

[58]Report of the Commissioner of Mediation and Conciliation for 1913-1919.

[59]Mediation needed the assistance of compulsory investigation to give it increased effectiveness. William McCabe said of the Newlands Act, "The law failed to provide the logical initial supplement to voluntary mediation and arbitration . . . the appointment of a commission of investigation and recommendation when mediation and arbitration have failed." Federal Intervention in Labor Disputes Under the Erdman, Newlands and Adamson Act, 7 Pro. Acad. Pol Sci. 94.

[60]See strikes of 1877, p. 468. This method was used by President Harding in the West Virginia mine strikes of 1921.

[61]See Pullman strike of 1894, p. 472.

junction, personal intervention by the president, and intervention by the division of conciliation of the Department of Labor. The federal government can employ, within limited fields, any one, or all three of these modes of intervention in dealing with either railroad or mine disputes. We will consider briefly the respective effectiveness of these three methods.

The Use of the Injunction in Labor Disputes: The right of the federal government to issue injunctions in labor disputes is based, first on the control which Congress enjoys over interstate commerce and the mails. This control was held in *In Re Debs*[62] to grant to Congress the right to "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the carrying of the mails." This case held further that the courts could invoke the injunction to restrain such obstruction, asserting that "the right of the courts to interfere in such matters is recognized from ancient times and indubitable authority." The right to issue injunctions is based, secondly, on a group of statutes which either actually or impliedly give the federal courts equity jurisdiction. These are the Interstate Commerce Act which makes illegal combinations which deny equal facilities in the transfer of interstate commerce between connecting lines;[63] the Sherman Anti-Trust Act which condemns "every contract, combination . . . or conspiracy in restraint of interstate trade or commerce" and provides for the use of the injunction as a preventive remedy, and the Clayton Act which defines the limits within which the injunction may be used in labor disputes.[64]

The equity jurisdiction bestowed upon the courts by these acts has been subject to the limitation that injunctions will not issue in strikes which have as their sole object the improvement of working conditions. This rule which has been laid down by a long line of decisions,[65] is based on the theory that equity will not compel the performance of personal service. All of the

[62](1894) 158 U. S. 564, 39 L. Ed. 1092. 15 S.C.R. 900.

[63]24 Stat. at L. 380, 383, secs. 3 and 12.

[64]Two other statutes, one providing a penalty for all conspiracies against the United States, (Revised Statutes, Sec. 5440), and the other making interference with the mails criminal, (Revised Statutes, Sec. 3995), provide grounds for the issuance of injunctions when their violation is accompanied by irreparable injury to property. Note statement made by Judge Taft in In Re Charge to the Grand Jury, (1894) 62 Fed. 828: "When an irreparable and continuing injury is threatened to private property equity will generaly enjoin on behalf of the persons whose rights are to be invaded even though an indictment in behalf of the public will also lie."

cases establishing this principle, however, draw a distinction between requiring continuance of service and requiring the discontinuance of illegal acts.[66] *Arthur v. Oakes,* the first federal case clearly to announce this principle recognized as unlawful any combination "which has for its object to cripple the property . . . and to embarrass the operation of the railroads . . ."[67] This distinction has been observed in later cases.[68] It may be said by the way of summary, then first, that as the law now stands, injunctions will not issue against a combination, the object of which is lawful; secondly, that if, in the course of a lawful strike violence or intimidation are used these unlawful acts will be enjoined,[69] and thirdly, that injunctions will issue where the combination has for its object the destruction of property, embarrassment of operation of business, or coercion of innocent third parties, or other unlawful purposes. The secondary boycott comes under this category.[70]

The Clayton Anti-Trust Act which was at first believed to limit the federal power of injunction, has really done no more

[65]Arthur v. Oakes, (1894) 63 Fed. 310, 11 C.C.A. 209, 25 L.R.A. 414, Toledo A. A. & N. M. v. Penn. Co., (1893) 54 Fed. 730, United States v. Elliott, (1894) 64 Fed. 27 and Wabash v. Hannahan, (1903) 121 Fed. 562.

[66]United States v. Elliott, (1894) 64 Fed. 27 calls attention to this distinction, and Morton Poe Fisher in a thesis on "Grounds for the Issuance of Injunctions by the United States Courts In Trade Disputes Between Employers and Employees," published in the Baltimore Daily Record, June 10-11, 1920, emphasizes this point strongly.

[67]The "embarrassment" which a peaceful strike would occasion, is not here meant for the court specifies embarrassment "either by disabling or rendering unfit for use property . . . or actually obstructing their control or management of the property by using force, intimidation or threats or other wrongful methods against the receivers or their agents or against the employees remaining in their service, or by using like methods to cause employees to quit or prevent or deter others from entering into the place of those leaving it."

[68]United States v. Elliott, (1894) 64 Fed. 27, Wabash v. Hannahan, (1903) 121 Fed. 562, and others.

[69]Picketing comes under this category. Earlier cases held that picketing was illegal and enjoinable when it went beyond the bounds of peaceful persuasion and amounted to intimidation. Goldfield Consolidated Mines Co. v. Goldfield Miners Union, (1908) 159 Fed. 500. Chief Justice Taft, however, in a recent decision, Truax et al. v. Corrigan, (1921) 258 U.S. 312, 42 S.C.R. 124, practically held in dicta that picketing which involves more than one picket per entrance is illegal. He held that "peaceful picketing was a contradiction in terms," but stated that "subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably persuade the employees and would-be employees to join them in it."

[70]The whole problem of the boycott, primary and secondary, is discussed in great detail in Laidler, Boycotts and the Labor Struggle, passim.

than "codify" the rules already laid down in court decisions. Section 6, which definitely legalizes labor organizations and their legitimate activities, is merely a restatement of the principle laid down in *Arthur v. Oakes,* and section 20 does no more than place beyond the reach of the injunction those activities of labor organizations which court decisions have already recognized as legal.[71] Even the hope of labor that the Clayton Act legalized the secondary boycott was shattered by the Supreme Court in the *Duplex Printing Case.*[72] The act has, in short, not materially changed the legal position of labor.

In spite of the protections which the courts have placed about the use of the injunction, the federal equity power extends materially the field in which the government can intervene in labor disputes. This is true because it is not limited to disputes involving men in a particular industry as it is by the arbitration acts, but can reach out to any threatened interference with a federal agency, such as the mails, or an interest under federal protection such as interstate commerce.[73] Mine strikes which involve illegal acts in restraint of interstate transportation of coal are brought within the cognizance of the federal government by the injunction.

The value of the injunction as a preventive remedy depends in the last analysis, however, not so much upon the scope of its field as upon its effectiveness and upon its justice. For such a

[71]This clause, laying down the important limit that the dispute must be between employers and employees or between employees or between persons employed and persons seeking employment, states that if the dispute is concerning terms or conditions of employment and does not give rise to irreparable injury, and injunctions will not restrain such actions as terminating relation of employment, recommending or advising others so to do, or from ceasing to patronize or from recommending others so to do.

[72]Duplex Printing Co. v. Deering, (1921) 254 U.S. 443, 65 L. Ed. 349, 41 S.C.R. 172, 16 A.L.R. 196. The court in this case decided that the limiting clause that the dispute must be between employers and employees, etc., (ibid), acted to place the secondary boycott which is not between employers and their employees directly outside of the acts legalized by the Clayton Act. The dissenting opinion held that the terms employers and employees meant employing and working classes in general and did not refer to the individual employer and his employees.

[73]Note Lowe v. Lawlor, (1908) 208 U. S. 274, 53 L. Ed. 488, 28 S.C.R. 301 on the extent of the government's power to intervene in labor disputes through the equity power: "A combination may be in restraint of trade and within the meaning of the anti-trust act although the persons exercising the restraint may not themselves be engaged in interstate trade and some of the means employed may be acts within a state and individually beyond the scope of federal authority . . . but the acts must be considered as a whole and if the purposes are to prevent interstate transportation the plan is open to condemnation under the anti-trust act."

strike as the railroad strike which was threatened in 1916, which has as its only object higher wages and shorter hours, comes, under the existing rules of law, in the category of lawful strike.[74]

It is likewise an inadequate remedy for the mine strike free from violence and unlawful picketing. It can prevent the illegal acts which accompany railroad or mine strikes, but it cannot force striking railroad or mine employees, who are utilizing in a peaceful manner their recognized right to withdraw their services in an attempt to improve their working conditions, to return to work against their will.

The injunction, however, becomes a remarkably effective remedy for even the so-called legal strike when it includes in its prohibitions acts hitherto considered peaceful, and hence legal, which are vital to the successful execution of the strike. The Wilkerson order issued at the height of the recent shopmen's strike, attempts to restrain several such acts,[75] and if sustained will establish a precedent which will greatly increase the adequacy of the injunction as a weapon against the peaceful strike. Its effect will be, in fact, to illegalize every strike on interstate railroads. It should be noted at this point that the Wilkerson injunction, if sustained, will extend the power of the injunction only in the field of strikes on interstate railroads. It is based solely on the power of the government to "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the mails," and

[74]It is only a matter of time, however, before court decisions will be altered to modify the general rule in its application to railroad strikes. An indication that a different rule will be evolved for railroad strikes is given in the case of Wilson v. New, (1917) 243 U.S. 332 61 L. Ed. 755, 37 S.C.R. 298, in which Chief Justice White said, in obiter dicta, "Whatever would be the right of an employee engaged in a private business to demand such wages as he desired and to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when the employment is accepted in a business charged with a public interest," For full discussion of this trend see infra, chapt. III. See opinion of Amidon, J. in Great Northern Ry. Co. v. Brosseau, (1923) 286 Fed. 414, with review of the cases.

[75]Labor leaders are restrained from issuing any instructions or public statements to members of their unions to induce them to do or say anything to cause any railroad employee to leave his work or to cause any person to leave the employment of the railroad." Officers of the unions are restrained from "picketing or in any other manner by letters, circulars, telephone messages, word of mouth communications or interviews, encouraging any person to leave the employ of a railroad or to refrain from entering such employ." Not only is interference by threats forbidden, but also interference by "epithets, jeers, taunts or entreaties, striking shopmen enjoined from entering on railroad property and meetings of unions for prolonging the conspiracy are forbidden.

consequently will not alter existing equity law in other fields. The wording of the injunction itself indicates clearly that the aim is to restrain only those acts which "interfere with, hinder or obstruct railroad companies in the movement and operation of passengers and property in interstate commerce or the carriage of the mails."[76]

The injunction is becoming increasingly effective in dealing with unlawful combinations, for the courts are gradually strengthening their power to compel obedience to their awards. They can bring great pressure to bear on recalcitrant unions by enjoining the officials from the payment of strike benefits; they can enjoin labor officials from calling illegal strikes.[77] Furthermore, in the *Danbury Hatters Case*[78] they established their power under the Sherman Act to assess damages against individual workmen guilty of practices amounting to unlawful restraints of trade. And the United States Supreme Court further strengthened these broad powers last June when, in reviewing the *Coronado Mine Case*,[79] it held in dicta that labor unions could be held liable for damages for illegal strikes which they had encouraged or ratified.[80]

This brief summary of the federal equity power leads to the conclusion that although the injunction is becoming increasingly effective in the field of illegal strikes it is, unless strengthened in the manner discussed above, ineffective in the field of strikes where the cessation of work is unaccompanied by illegal acts. It cannot, moreover, meet the ultimate requirement of justice. In the first place the ordinary law courts are ill-equipped to pass on the merits of labor cases; and even if they were better equipped the issues raised in these cases are not usually the fundamental issues under dispute between labor and capital but the technical legality of specific and frequently incidental acts. Thus a strike may be enjoined while the real merits of the controversy between employer and employee be completely ignored. In leaving this

[76]Sections (a) and (h)

[77]In re Charge to Grand Jury, (1894) 62 Fed. 828.

[78]Lowe v. Lawlor, (1908) 208 U.S. 274, 52 L.Ed. 488, 28 S.C.R. 301.

[79](1919) 258 Fed. 829, 169 C.C.A. 549, affirmed 42 S.C.R. 587.

[80]Dowd v. United Mine Workers of America, (1916) 235 Fed. 1, 148 C.C.A. 495 had previously held that the word "association" in the Sherman Anti-Trust act included unincorporated associations such as labor organizations and that such organizations could be sued under their names by persons injured in their business by their action in violation of the provisions of the act. United Mine Workers of America v. Coronado Coal Co., (1919) 258 Fed. 829, 169 C.C.A. 549, affirmed 42 S.C.R. 587, citing the above case held that corporations or associations are liable for the torts of their members if encouraged in the commission of them, or if ratified thereafter.

section, therefore, the final conclusion is that the injunction, to be just, should be used only as a last resort, and after free opportunity has been given for a consideration of the rights of both parties.

Personal Intervention of the President: We come now to a discussion of the personal intervention of the president as a mode of federal intervention. It is through the power of the president to mediate in strikes of national import that federal influence is brought to bear most effectively on the settlement of mine disputes. His right to act as mediator in labor controversies is purely extra-legal and rests upon his personal and official influence.[81] Theodore Roosevelt was the first executive to exercise this power,[82] and his action in intervening in the anthracite coal strike of 1902 established a precedent for future presidential action.

The strong and weak points in this method are easily discernable. Twice in notable instances personal intervention has succeeded; twice it has failed miserably. It was successful in the case of the anthracite coal strike of 1902[83] in which Roosevelt offered his services as a mediator and was finally able to persuade both sides to submit their differences to arbitration.[84] Not only

[81]The Outlook of Dec. 9, 1914, says, editorially, of this mode of intervention, "There is nothing in the constitution or laws of the United States authorizing the president to act in this way; but such action is entirely justifiable on the grounds that there is nothing in the constitution or laws of the United States forbidding him to do so and there is every reason why the man who occupies the presidency should employ every lawful means in great emergencies to exert the influence that the office gives him as the one representative of the whole people to promote order and establish justice."

[82]Roosevelt acted on what he termed the "Jackson-Lincoln" theory that "occasionally great national crises arise which call for immediate and vigorous action and that in such cases . . . the proper attitude for him to take (the president), is that he is bound to assume that he has the legal right to do whatever the need of the people demand unless the constitution or the laws explicitly forbid him to do it." Roosevelt, Autobiography, p. 504.

[83]An account of Roosevelt's action in this strike is given in the ex-president's autobiography.

[84]Had the two sides failed to arbitrate President Roosevelt planned to induce the governor of Pennsylvania to call on him for aid; he then planned to send Major-General Schofield to keep order and prevent interference with men who wanted to work. He also would instruct General Schofield to "dispossess the operators and run the mines as a receiver" until the government investigating commission could make its report and he himself could issue further orders. (Autobiography) Wilson contemplated a similar scheme in the Colorado strike but found it to be illegal. New York Times, Nov. 25, 1914.

The operators, who objected strenuously to the term "labor representative," were finally conciliated by President Roosevelt's adroitness in disguising the labor representative, E. E. Clark of the Brotherhood of Railway Conductors, under the imposing title of "eminent sociologist." (Autobiography).

was immediate peace secured by arbitration, but machinery for the peaceful settlement of disputes was set up and outlived the term of the award.

Intervention by President Wilson succeeded in 1919 in bringing miners and operators to terms after all other methods had failed. In the fall of that year a general strike was called by the United Mine Workers of America. After an unavailing attempt by the secretary of labor to avert the strike, and after an injunction directed against the leaders had failed to keep the men from quitting work, President Wilson intervened and proposed a basis of settlement which was accepted.[85]

Presidential intervention failed dismally, however, in the case of the Colorado mine strike in 1914,[86] because of the absolute refusal of the mine operators to accede to President Wilson's compromise proposals. The strike dragged on and ended, finally, in a defeat for the workmen. Presidential intervention was also unavailing in the threatened rail strike of 1916.

Presidential intervention again failed last summer in the settlement of the bituminous and anthracite coal mine strike. It failed also in the settlement of the shopmen's strike. After the unsuccessful attempts of President Harding and Secretary of Labor Davis to bring the striking miners and operators to terms, the miners and operators themselves, unassisted, settled their dispute. They did not settle it however, until after five months had elapsed and the country's coal supply had been seriously endangered. Seniority was the snag which prevented presidential mediation from ending the railroad shopmen's strike.

It is clear from the foregoing that the effectiveness of this type of intervention lies wholly in the strength of the public opinion it can call into action; its chief weakness lies in the lack of any legal power in the president to compel the disputants to come to terms. It may, however, be regarded as a moderately effective method of federal intervention considering its purely informal and extra-legal character.

The Conciliation Division of the Department of Labor: The arbitration acts, the federal equity power and the efforts of the president have opened up to federal intervention practically all of the labor fields in which the national interest is paramount. Through the conciliation division of the Department of Labor

[85]This brief discussion of the 1919 mine strike is based on accounts in the New York Times.

[86]New York Times and general periodical accounts.

the government is endeavoring to reach those other disputes which, while not strictly of national interest, are detrimental to industrial peace. By the act of 1913 establishing his department[87] the secretary of labor is instructed to act as mediator and to appoint commissioners of conciliation whenever the interests of industrial peace require it.[88] These federal officers may intervene in every serious labor dispute in the country. They may, however, do no more than attempt to bring the two contending parties together to work out the solution of their own problems.[89] The constitutional basis of this power was explained by Representative Wilson in the House. He declared that if compulsion were present the power would be in the states but said:

"In fact (the bill) only gives (the secretary) the power to act in a friendly way to bring the parties together, and I know of nothing in the constitution that would prevent any officer of the government from using his friendly offices toward bringing contending parties together in that way."[90]

The success of this method can be seen from the increasing number of disputes which have been settled by the federal mediators.[91] During the first year 28 cases were successfully adjusted; in 1915, 42 cases were dealt with; in 1916, 227; in 1917, 378; in 1918, 1,217,[92] and in 1919, 1,780. In 1920 the number fell to 802.[93] The wide distribution of these disputes is indicated in the annual report of the secretary of labor for 1917 who says:

"The cases embraced controversies . . . in 43 states together with Alaska and Porto Rico and "comprised questions affecting establishments of nearly every commercial and industrial classification."[94]

The conciliation division of the Department of Labor has done perhaps more in the interests of true industrial peace than any other agency of federal intervention. It has given collective

[87]37 Stat. at L. 736-38.

[88]37 Stat. at L. 738, sec. 8.

[89]It is interesting to note that the conciliation division has itself established the policy of refusing to intervene in disputes "so long as any successful termination of the case (is) being worked out by the employer and his employees." 1920 report of the Department of Labor, 80.

[90]Cong. Rec. 62nd Congress, second session, p. 8851.

[91]The following figures are based on the reports of the secretary of labor for the years 1913-1920.

[92]The sudden increase in the number of disputes mediated in this year was a result of the war. Both labor and capital showed a desire to settle all disputes peacefully during the the war period.

[93]The drop in 1920 is due to the return of peace and the reaction which set in upon both labor and capital.

[94]1917 report of the Department of Labor, p. 52.

bargaining an impetus which far exceeds the impetus given by arbitration or by presidential intervention,[95] and has educated labor and capital in the merits of conciliation as no other method has done.[96] The weakness of this mode of intervention, like the weakness of presidential intervention, lies in the lack of any power in the mediators either to compel labor and capital to come together, or to agree to a peaceful settlement.[97] Because of this inherent weakness it is clearly evident that the mediation of the department of labor can in no sense be regarded as a reliable method of settling rail and mine disputes.

The number of disputes actually settled by this method, however, far exceed those which are not,[98] and employers show increasing willingness to submit to mediation. The ability of the division of conciliation each year to keep the peace in a large number of industries, and its great service in stimulating collective bargaining, offsets its lack of power to enforce its awards, to a modified extent, and warrants the further development of this mode of mediation in a scheme of federal intervention in labor disputes.

It is clear from the foregoing discussion that neither in the injunction nor in the mediation, either of the president or of the secretary of labor, does the public find any absolute guaranty of freedom from a nation-wide rail or mine strike. As industrial dis-

[95]This assertion will be readily acceded to when it is pointed out that during the entire period from 1913 until 1919 mediation and arbitration were resorted to under the Newland Act only 91 times, whereas in the same period mediation and conciliation functioned 3,762 times. Personal intervention by the president has also been used very sparingly.

[96]The rapid growth in the number of disputes in which mediation is asked illustrates that the education is achieving results. The fact that in recent years strikes are in progress in only 30 per cent of the cases when the mediators are summoned, whereas early in the history of the division's work strikes were usually in progress in more than 70 per cent of the disputes before the mediators were summoned, also illustrates the point that capital and labor are being educated in the merits of mediation and conciliation.

[97]A minor weakness lies in the fact that capital regards the Department of Labor as a body especially favorable and sympathetic to labor and hence is hesitating in submitting the determination of its rights to a body which it regards as partisan.

[98]The following table shows the relationship between the number of cases settled and those in which no agreement could be arrived at:

Year	Cases Successfully Settled	Not Adjusted
1913-14	33	5
1915	42	10
1916	227	22
1917	248	47
1918	1,217	71
1919	1,780	111
1920	802	96

turbances in the transportation and mining fields increase in frequency and in seriousness, the public demand for an effective method of strike prevention, is becoming increasingly insistent. The recent phases of the railroad and mine strike problem, and the steps that are being taken to make strikes in these fields less frequent, will be discussed in the following chapter.

(*To be concluded.*)