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FEDERAL INTERVENTION IN LABOR DISPUTES*

BY MARJORIE JEAN BONNEY†

III

RECENT PHASES OF THE RAILROAD STRIKE PROBLEM

THE problem of the railroad labor dispute assumed new proportions in 1916 when the four brotherhoods⁹⁶ united for the first time in a demand for higher wages and shorter hours. The revolution in congressional attitude which followed this demonstration of strength by the brotherhoods, and the resulting trend toward the adoption of drastic measures call for separate treatment in this final chapter.

Congress in 1913 had reached the peak of its policy favoring voluntary arbitration. As long as capital had stubbornly refused to arbitrate Congress had felt the need of exerting compulsion upon the railroad companies but even in the acts of 1888 and 1898 had adhered in the main to the policy of voluntary arbitration. But when in 1913 capital by its friendly attitude toward arbitration showed that compulsion was unnecessary, Congress passed the Newlands Act providing for arbitration which is entirely voluntary.⁹⁷ Congress had not conceived of the possibility that labor might repudiate arbitration.⁹⁸ When in 1916 this occurred,⁹⁹ and Congress was forced, by the fear of a nation-wide strike, to grant labor's demands by legislation, the legislative at-

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⁹⁶The Brotherhoods of Locomotive Engineers, Locomotive Firemen and Enginemen, and Railroad Trainmen, and the Order of Railroad Conductors.

⁹⁷The clauses of the Erdman Act forbidding and declaring unlawful strikes and discharges pending arbitration and for three months afterwards were omitted in the Newlands Act. These clauses had been dead letters in the Erdman Act.

⁹⁸Labor, at the time the Newlands Act was passed, had never endangered industrial peace by refusing to submit its differences to arbitration. In the crisis which gave rise to the Newlands Act the employees were willing to arbitrate under the Erdman Act as it stood, but the carriers refused. See *supra*, chapter I, pages 467-78.

⁹⁹The brotherhoods in this year "dissatisfied with the personnel and decisions of recent arbitration boards, insisted upon their demands being granted and voted to strike." The roads were willing in 1916 to arbitrate. (Bing, *War-time Strikes and Their Adjustment* 83.)

titude changed. Congress, which in previous years had argued heatedly in favor of voluntary arbitration,¹⁰⁰ in 1920 argued with equal fervor for anti-strike legislation.¹⁰¹ It passed finally a measure¹⁰² which, as interpreted, compels submission to arbitration, and which by reason of the attitude of the Department of Justice, may, in many cases, compel submission to the award.¹⁰³ The remainder of this article, apart from a brief discussion of the Adamson Act, will deal with the Transportation Act of 1920.

The Adamson Act¹⁰⁴ was passed by Congress to avert the rail strike of 1916 after both mediation and presidential intervention had failed. It did not provide for arbitration. It was in itself an act of intervention. Ostensibly it gave labor an eight-hour day. Actually it granted a compulsory wage increase operative for a limited period,¹⁰⁵ not because investigations had proved it desirable, for no investigations had been made, but because labor demanded it as an alternative to a strike.¹⁰⁶ Nor did the act provide for permanent machinery for dealing with labor disputes. President Wilson, in his request for the bill, had recommended that compulsory investigation be provided,¹⁰⁷ and Senator Under-

¹⁰⁰Note what Representative Clayton had to say on compulsory arbitration in the debate over the Newlands Act: "God forbid . . . that Congress should ever enact compulsory arbitration laws. It would be in the teeth of the constitution; it would be in the teeth of the inherited rights of every free American to have any sort of law whereby any man could be compelled to render labor against the sovereign will which he carries under his own hat." (Cong. Rec., 63rd Congress, first session, p. 2434.)

¹⁰¹Senator Cummins: "Even if I were to grant that the individual right to cease employment is perfect and complete I could not grant that the right to enter into a combination or conspiracy to accomplish a purpose inimical to the welfare of society is a natural or constitutional right." Senate debate on Esch-Cummins bill Cong. Rec., Dec. 4, 1919, p. 146.

¹⁰²41 Stat. at L. 456-499.

¹⁰³See *infra*, p. 556.

¹⁰⁴39 Stat. at L. 721.

¹⁰⁵The president's Eight Hour commission, in making its report, as provided for in the act, said, "It is well to emphasize the fact that while the law requires eight hours to be the measure or standard of a day's work for the purpose of reckoning the compensation for train service employees, it does not limit the actual working time to eight hours." The congressmen themselves knew the bill to be a wage-fixing bill. Said Senator Sherman, "In essential analysis this is not an 8-hour day law. . . . It is a question of the increase of wages by paying ten-hour wage for eight hour service." Cong. Rec., 64th Congress, p. 13616. The law did, in actual operation, cause an eight-hour day to be instituted in the yard service, and the time of some of the train crews was shortened, but it was primarily a wages law. Eight-Hour Commission report.

¹⁰⁶Note attitude Senator Underwood took toward the bill; he said: "For one I am willing to surrender my individual judgment, admit that I am legislating without knowledge, to bring peace . . . to the home of the people of the nation. (Cong. Rec., 64th Cong., first session, p. 13556.)"

¹⁰⁷For the six requests made by President Wilson in submitting his

wood, during the course of the debate, proposed giving to the Interstate Commerce Commission wage-fixing powers.¹⁰⁸ Neither provision was included in the act, however. The result therefore, was an act which did nothing more than settle an existing dispute.

The problem left unsolved by the Adamson Act was solved for a period of over two years by federal control of the railroads,¹⁰⁹ under which all disputes were settled by bi-partisan wage-adjustment boards. With the return of the railroads to private control the old problem reared its head and Congress bent its energies toward including in the act returning the railroads an effective section which would minimize the strike danger.

It has been noted that Congress was by this time vigorously discussing anti-strike measures. The courage openly to advocate such measures was probably gained from the judicial support given the Adamson Act in the case of *Wilson v. New*.¹¹⁰ It was here held that a general railroad strike constituted such an obstruction to interstate commerce as to bring the whole subject within congressional control. The case, moreover, strongly suggested in dicta that it was within the power of Congress to pass a compulsory arbitration law,¹¹¹ and hinted that the right of railroad employees to strike could be limited. Said Chief Justice White:

"Whatever would be the right of an employee in a private business to demand such wages as he desires, to leave the employment if he does not get them, and by concert of action to agree with others to leave upon the same conditions, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest."

The Senate, using much the same line of argument,¹¹² passed a bill which made a conspiracy to strike punishable by a maxi-

plea for the Adamson Act to Congress, see the Congressional record, 64th Congress, first session, p. 13361 (message to joint session).

¹⁰⁸For Underwood's proposals, see *ibid*, p. 13611 (was amendment).

¹⁰⁹Lack of space makes it impossible to discuss the relationship of the government to the labor strike problem during the war period. For a full discussion of this phase of federal intervention in labor disputes see Willoughby, *Government Organization in War Time and After*, and Bing, *War-Time Strikes and Their Adjustment*.

¹¹⁰(1916) 243 U.S. 332, 61 L.Ed. 755, 37 S.C.R. 298.

¹¹¹Said the court, "Congress had the right to adopt the act in question, (the Adamson Act) whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject . . . or as an exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration."

¹¹²Note statement by Cummins, *supra* p. 551 footnote 101.

mum fine of \$500. A committee of wages and working conditions and three regional boards were created as "substitutes for the strike."¹¹³ The House, however, objected to the anti-strike clause, and in conference it was stricken out. We are now ready to turn to a discussion of the labor section of the Transportation Act as it was finally passed.¹¹⁴

It is fundamental to note at the outset that this section is not operating as it was intended to operate. It seems designed primarily to stimulate conciliation and to afford machinery for voluntary arbitration only in case that fails. In practice it has stifled conciliation and elevated arbitration to a position of first importance.¹¹⁵ In short, in its operation it runs counter to the lessons experience with labor disputes has taught, and has failed to render the useful service of which it is capable. Before reviewing the transformation of the act from a measure providing for conciliation as the chief functioning agent and arbitration simply as a last resort, to one nullifying conciliation and utilizing arbitration as the sole remedy, we must review briefly its main provisions.

The act provides first, that when disputes likely to interrupt commerce arise between carriers and their employees, "such disputes shall be considered and if possible decided in conference between the parties concerned."¹¹⁶ It next provides that when the carriers and their employees desire, adjustment boards, authorized to settle disputes arising out of grievances, rules and working conditions may be established.¹¹⁷ Clearly conciliation was here in mind. The act then provides for a Railroad Labor Board of nine, composed of three representatives of labor, three of capital and three of the public, which is charged to hear and decide wage disputes not settled in conferences, and all disputes over grievances, rules and working conditions not settled by ad-

¹¹³For the debate on the original Esch-Cummins bill providing for the anti-strike clause, see Cong. Rec. 6th Congress, first session, Dec. 4, 1919.

¹¹⁴Sections 300 to 315 of the Transportation Act, (41 Stat. at L. 456, 469-473, 66th Cong. 2nd session Chapt. 91). The act is very broad in its scope applying to "all carriers, their officers, employees and agents." (Sec. 301) In its breadth of scope the act is comparable to the act of 1888.

¹¹⁵Note statement made by Representative Esch in reporting the bill from the conference: "There is no compulsion in the bill. The only thing that can be done by the Railroad Labor Board is to subpoena witnesses . . . in order that a full, complete and thorough investigation can be made. . . . There is nothing in this bill regarding compulsory putting into effect the award of this railroad board." (Cong. Rec., Vol. 59, p. 3270.)

¹¹⁶41 Stat. at L. 456, 469 sec. 301.

¹¹⁷41 Stat. at L. 456, 469, sec. 302.

justment boards.¹¹⁸ The awards of the Labor Board are to be published.¹¹⁹ No other provision is made for their enforcement. The Labor Board is, however, given the authority to make investigations when it believes one of its awards has been violated, but it can then do no more than "make public its decisions in such manner as it may determine."¹²⁰

Conciliation is being stifled and arbitration encouraged chiefly because the act, unlike previous arbitration acts, permits either side to inaugurate arbitration proceedings.¹²¹ The result is that the conferences provided for by the act have become futile; for the weaker side to a dispute, fearing the results of collective bargaining, is almost always eager to rush through the conferences and push the matter to the Labor Board where it feels it may secure more satisfactory terms.¹²² The first moves to correct this evil have come from the employees. Members of the craft federation, dissatisfied with the summary manner in which the railroad executives discuss disputes, have asked that the Labor Board remand to local conferences disputes which have not been fully discussed.¹²³ As long as either side feels that it has more to gain from the Labor Board than from the collective bargain, and can, by refusing to agree in conference, get its case to the board, conciliation under the act will continue to be ineffective and arbitration the most common means of settling disputes.

Nor are the adjustment boards provided for by the act fostering conciliation to any great extent. The transportation brother-

¹¹⁸ The Labor board is established by sec. 304 of the Transportation Act. 41 Stat. at L. 456, 470. This section provides that the representatives of the labor and management groups be appointed by the president from six nominees each named by the respective groups and that the president appoint directly the three representatives of the public group. In case either side fails to nominate the president is authorized by sec. 305 to appoint directly the representatives for that side. Sec. 307 (c) provides that decisions by this board shall require the concurrence of at least 5 of the 9 members, and that in the case of wage disputes, at least one member of the public group must concur in the decision.

¹¹⁹41 Stat. at L. 456, 470 sec. 307.

¹²⁰41 Stat. at L. 456, 473 sec. 313.

¹²¹Permission is not definitely given. The fact that the failure of conferences carries cases to the board operates to give this general effect, however.

¹²²A general chairman of one of the craft organizations has assured the writer that the act does actually function in this manner. Recently the shop crafts, he stated, conferred with the executives over new rules. Out of these conferences only thirty-eight rules were jointly agreed to; the matter was then removed to the Labor Board where 186 rules were laid down.

¹²³Statement by a general chairman of the Brotherhood of Railway Carmen of America.

hoods are the only organizations which have cooperated with the railroads in the formation of adjustment boards. These brotherhoods, in conjunction with fifty railroads have established a bipartisan board in each of the three regional districts. These boards, however, have a very limited jurisdiction. They are deprived by the act itself of jurisdiction over wage disputes, and they are further deprived by the agreements under which they are established, of the jurisdiction which the act aimed to give them over disputes concerning changes in rules and working conditions.¹²⁴ Conciliation is therefore functioning in the very limited field of personal grievances, and disputes arising out of the construction of rules and schedules established by the Labor Board.

While practise is thus encouraging arbitration official interpretation of the act is making that arbitration compulsory in the first instance by establishing the power of the Labor Board to compel submission of disputes for consideration. This power is based on interpretation of sections 301 and 307. The former states that all disputes not decided in conference shall be referred by the parties to the board authorized to hear and decide such disputes, and the latter states that the Labor Board shall hear and decide all disputes not settled by adjustment boards and shall receive for hearing and decide all disputes with respect to wages when such disputes are likely substantially to interrupt commerce.

When in 1921 the railroad employees were threatening to strike against the wage reduction recently recommended by the Labor Board, that body, asserting that the threatened strike was one liable to interrupt commerce, announced on October 22¹²⁵

¹²⁴In a general letter to "All general chairmen, local divisions and lodge members employed in the United States on railroads members of regional boards," instructions were sent out by the presidents of the four brotherhoods that "only disputes growing out of personal grievances or out of the interpretation, or application of the schedules agreements or practises now or hereafter established . . . shall be submitted to the board, (regional)," and it was specifically stated in large type that "All disputes arising out of proposed changes in rules, working conditions or rates of pay are specifically excluded from the jurisdiction of the board and under no circumstances should you attempt to submit them." General letter dated Cleveland, O., Nov. 1, 1921, and signed by W. S. Carter of the Firemen, W. S. Stone of the Engineers, L. E. Sheppard of the Conductors and W. G. Lee of the Trainmen.

¹²⁵The public group of the board had earlier submitted a proposal for the settlement which had been rejected. The board itself had attempted mediation which had also failed. When this latter method failed it was generally thought that the Labor Board had exhausted its powers. Its action on Oct. 22 was heralded by the *New York Times* as a "sensational development" which "left interested leaders too astounded to comment."

that it assumed jurisdiction of the dispute, and summoned both sides to a conference which was convened October 26. It also commanded the unions to maintain the status quo pending a hearing and a decision, an order that was "tantamount to a demand that the strike order for October 30 be rescinded."¹²⁶ The act does not specifically forbid a strike pending investigation as does the Canadian Industrial Disputes Act, but sections 301 and 307 give practically the same effect as a specific prohibition. As noted above they command the parties to submit the dispute to the proper board for hearing and decision. The logical deduction, therefore, is that since the dispute is submitted for decision it is intended that no cessation of work occur prior to such decision.

The question whether or not the board possessed the actual power to prevent a change in the status quo pending investigation was not answered in 1921, since the strike vote was recalled prior to October 30. The board, nevertheless claimed this power as well as the power to compel the parties to a dispute to appear before it and present their case. After the crisis was past it laid down the general rule that:

"When any change of wages, contracts or rules previously in effect is contemplated or proposed by either party conferences must be had as directed by the Transportation Act . . . and when agreements have not been made the dispute must be brought before the board and no action taken or change made until authorized by the board."¹²⁷

The board itself claimed no power to enforce its awards. It merely provided in a second general rule that whenever a strike should occur contrary to an award that:

"The organization so acting has forfeited its rights, and the rights of its members in and to the provisions and benefits of all contracts heretofore existing, and the employees so striking have voluntarily removed themselves from the classes entitled to appeal to this board for relief and protection."¹²⁸

The Department of Justice, however, claims that it is within the power of the government to stop by injunction strikes on

Even Senator Cummins had not believed that the Labor Board could take such steps as it took on Oct. 22, for a few days earlier he had said: "Of course if both sides are not willing to permit arbitration by the Railroad Board of their differences, then the railroad act becomes entirely ineffective."

¹²⁶New York Times, Oct. 22.

¹²⁷New York Times, Oct. 30. (Published by R. M. Barton, chairman of the board.)

¹²⁸Ibid.

interstate railroads.¹²⁹ If this assertion can be substantiated the result will be that the award of the Labor Board, although unenforceable under the act will, in many cases, become in actual practice, compulsory upon the parties. Particularly will this be so in the case of awards granting wage reductions. In such cases the employees will find themselves obliged to accept the reduction authorized by the board, or, unless they can come to a separate agreement with the carriers face the injunction. The railroads, on the other hand, it should be noted, would have the alternative of retaining the status quo in case a wage increase was recommended by the board.¹³⁰ Let us examine this claim of the Department of Justice, made first in 1921 and later repeated indirectly in connection with the railroad shopmen's strike.

It had been hinted in the newspapers early in the history of the 1921 controversy, that a legal method of enforcing the awards of the Labor Board had been found. It was suggested that the rail strike was an "overt act" which could be enjoined on the ground that the unions were violating an order of a branch of the government.¹³¹ When, however, on October 27 Attorney-General Daugherty announced the action the government would take if a strike occurred the Transportation Act was not mentioned. He based the right of the government to halt the strike by injunction wholly upon federal conspiracy statutes¹³² and upon the case of *In re Debs*. It is difficult to see how the claim of the government that a railroad strike constituted a conspiracy against the government could have been upheld. In *In re Debs* and *Wilson v. New*,¹³³ however can be found seemingly clear author-

¹²⁹A statement of the measures which the government would take if a strike were called on October 30 was issued by Attorney-General Daugherty on October 27. (Published in the New York Times of that date.)

¹³⁰If the Department of Justice should look beyond the actual physical obstruction to the cause of such obstruction it is possible that in a case where a strike resulted because of a refusal of the roads to put in effect a wage increase recommended by the board, the roads might be enjoined from disregarding the award of the Labor Board on the ground that by so acting they were directly responsible for the strike.

¹³¹New York Times article, Oct. 22. (The strike was officially called in protest to the wage reduction of 1920 authorized by the board.)

¹³²The chief reliance was placed on sec. 5440 of the criminal code, which makes an overt act in connection with a conspiracy against the United States punishable by a fine not to exceed \$10,000, two years' imprisonment, or both. Two other sections of the federal penal code providing fines for conspiracies to deprive citizens of any constitutional rights or privileges were also mentioned.

¹³³(1916) 243 U.S. 332, 61 L.Ed. 755, 37 S.C.R. 298. (See *supra*, Chapt. II, p. 482 footnote 74 also *supra*, this chapter, p. 552.)

ization for governmental intervention in railroad disputes. The former sustains the right of Congress to remove any obstruction of interstate commerce; the latter holds that a strike on interstate roads constitutes such an obstruction to commerce. The only constitutional question remaining is, can this governmental intervention take the form of compulsion of personal service? The existing court decisions suggest a negative answer to this question,¹³⁴ but with the Daugherty injunction case pending in the courts of the United States, it is not revolutionary to prophesy that the Supreme Court may sooner or later squarely decide what *Wilson v. New* hinted in dicta, namely that the rights of railroad employees to quit work, in view of the public nature of the employment, can be limited.

The Daugherty injunction in enjoining acts which indisputably would be legal in private controversies¹³⁵ has definitely assumed, apparently, that the government possesses the right to place limitations on the freedom of action of those persons engaged in the movement of interstate commerce which it never, constitutionally, could place on other private individuals. If the courts of the United States uphold this injunction without modification, it seems reasonably clear that they will be obliged to base their decision on a declaration of the power of the government, under the commerce clause, to limit the freedom of action of interstate railroad employees. While such a decision might avoid a direct assertion of the power of the federal courts to compel personal service, per se, the effect would be materially the same. On the day when a decision is handed down by the courts, either directly asserting the constitutional right of the government to compel personal service, or upholding its power to so limit personal freedom that the compulsion of service is the practical result, arbitration, for the employees at least, will be, in effect at least, compulsory in every aspect.

It is interesting to note at this point that all doubt concerning the ability of the Railroad Labor Board to enforce its awards, has been dispelled by a recent decision of the United States Supreme Court.¹³⁶ This decision, which recognized the power of the Labor Board to undertake to enforce through publication, the

¹³⁴Supra, Chapt. II.

¹³⁵See page 479 supra, footnote 65.

¹³⁶*Pennsylvania R. Co. v. United States R. Labor Bd.*, (1923) 43 S.C.R. 278. For decisions in lower courts see (1922) 282 Fed. 693; (1922) 282 Fed. 701.

holding of a new election by employees of the Pennsylvania Railroad, held that the Railroad Labor Board had no power to enforce awards which, after publication, had been disregarded. The district court, which denied the jurisdiction of the Labor Board, sustained the constitutionality of the Transportation Act itself.

It is evident, therefore, that practise and official interpretation are fast transforming the Transportation Act of 1920 into a compulsory arbitration act. The carriers and their employees no longer make honest attempts to settle their disputes themselves before carrying them up to a government agency. In previous years, under the Erdman and Newlands acts the two sides were accustomed to spend months in attempts to come to an agreement between themselves; then perhaps they would request mediation, or mediation would be proffered, and more time would be spent in endeavoring to reach a settlement. In the majority of cases disputes were settled by mediation, but in any event arbitration was not sought until all efforts to reach a settlement by the collective bargain had been exhausted. But at the beginning of the rail dispute of October 1921, when representatives of the men met committees of railroad executives in the eastern, southeastern and western districts the railroads briefly "declined to make any concession or offer any solution providing for a settlement."¹³⁷ And when later executives of the labor organizations met with a committee of railroad executives, a two-hour conference, "distinctly lacking in conciliatory spirit," was sufficient to demonstrate that no agreement could be reached.¹³⁸ Therefore, after conferences lasting hours instead of weeks and months, in which no conciliatory spirit was shown, the case went to the Labor Board for decision. Likewise the railroad shopmen, who went out on strike last July and the executives of the roads scorned the conference tables. Direct action, in this instance, was substituted for arbitration.

The result, therefore, is that the disputes which were formerly settled in most cases by the parties involved are today being

¹³⁷Statement by Warren S. Stone, president of the Brotherhood of Locomotive Engineers in *New York Times*, Oct. 18. The railroad employees met with eastern executives Aug. 3 with southeastern executives Aug. 16 and with western executives Aug. 17. Executives of southwestern roads did not meet with the men. At these meetings the employees asked what steps the roads planned to take on the wage situation, and the answer was in every case that the roads planned to proceed with the wage reduction. (Based on *New York Times* accounts.)

¹³⁸This conference was held Oct. 14 in Chicago. (*New York Times*, Oct. 15.)

settled by a government board before which the parties meet "not as parties to a conference but as parties to a suit at court."¹³⁹ The settlement is being made, moreover, not by the management group and not by the men, but by the public group whose understanding of the situation is based on such summary investigations as can be made by a board which in 1921 had 1,300 cases pending.¹⁴⁰ And the award, if it becomes enforceable, will be enforced by a branch of the government which does not consider the merits of the case.¹⁴¹

The ineffectiveness of the Railroad Labor Board as a strike-averting body, which was partially revealed by its near-failure in the rail crisis of 1921 was emphasized by its inability to prevent or to settle the shopmen's strike last summer. The shopmen, in defiance of an award of the board authorizing the railroads to reduce the wage-rate went on strike in July and remained out until the middle of September despite all efforts of the board to effect a settlement of the dispute between them and their roads.

The first action of the Labor Board when the strike was put into effect, was to pass an "outlaw" resolution which precipitated the entire seniority dispute. Obtaining no results from this resolution, the board proposed a peace conference. The roads, however, refused to participate in this conference unless the employees recalled the strike vote. This the employees refused to do, and the proposal came to nothing. Chairman Hooper of the board then held informal conferences and a basis of negotiation which included the return of the workers with full seniority rights, was reached. The roads flatly refused to consider the restoration of seniority rights, however, and the deadlock remained unbroken. President Harding then intervened with his peace proposals which likewise proposed to protect the seniority rights of the striking shopmen, and hence were futile. Conferences between the Interstate Commerce Commission and the railway executives, and between Secretary of Labor Davis and

¹³⁹Samuel Gompers in an article condemning the Railroad Labor Board. (New York Times.)

¹⁴⁰Ibid.

¹⁴¹Said Attorney General Daugherty, commenting on the conference of state attorneys-general which was held to discuss the action the government could take in case of a rail strike, "We did not discuss the merits or the matters in dispute . . . with the merits of the controversy the Department of Justice takes the position that it has nothing to do and the merits will probably not be entered into at any time . . . many more Americans are interested in [the railroads], in seeing that they serve the public than in this controversy regardless of who is right or who is wrong." (New York Times, Oct. 25.)

the strikers, were likewise unavailing and the president's compromise which provided that the seniority issue go to the Labor Board for decision was refused by the roads. The transportation brotherhoods then intervened, but their arbitration failed likewise, the seniority issue once more blocking success. Then came the Wilkerson restraining order September 1, which was followed shortly by a partial settlement under the Baltimore agreement. Under this settlement arrangement was made for the adjustment of the seniority issues by a committee of six representatives of the railroad organizations and six representatives of the employees.

The futility of the efforts of the Railroad Labor Board to settle this strike has aroused active dissatisfaction with the Transportation Act in official as well as in unofficial circles, and the likelihood is that the coming year will see important changes in railroad labor legislation. President Harding, referring to the Transportation Act in his message to Congress last December, stated that "it is now impossible to safeguard public interest because the decrees of the board are unenforceable against either employer or employee," and declared that "public interest demands that ample power shall be conferred upon the labor tribunal . . . to require its rulings to be accepted by both parties to a disputed question." While he recognized the right to cease labor, he limited the recognition by observing that "since the government assumes to safeguard his interests, (those of the laborer) while employed in an essential public service, the security of society itself demands his retirement from service shall not be so timed and related as to effect the destruction of that service." He referred to the partisan nature of the board as one of its chief weaknesses, and proposed as a substitute a non-partisan labor division in the Interstate Commerce Commission.

Secretary of Labor Davis has openly advocated the abolition of the Railroad Labor Board, and many of the labor organizations, equally disgusted with the board, have announced their intention of returning to direct dealings and have indicated that they would welcome the restoration of the Newlands Act.

The ineffectiveness of the Labor Board in averting strikes does lie as President Harding pointed out, in its inability to enforce its own awards. Until, however, the conciliation features of the Transportation Act are fundamentally strengthened and arbitration looked upon, not as the initial remedy but as the last

resort in the settlement of strikes, will it be in accord with justice to give to the Labor Board the power to enforce its decisions.

In moving toward a system of compulsory arbitration which offers the two sides to the dispute no adequate opportunity to come to a settlement between themselves, the government is disregarding all of the lessons its own experience has taught.¹⁴² The Transportation Act as passed aimed primarily at conciliation and only secondarily at arbitration. Is it not possible, therefore, in the light of past experience, so to amend the act that it will achieve the results at which it aimed and which experience justifies?

Experience has taught three major lessons. It has taught, first, that the parties directly involved in a dispute are, in the majority of cases, capable of settling their own disputes through the collective bargain without recourse to arbitration, and that settlements reached in this manner are more satisfactory than settlements reached through awards of arbitration boards. It has taught, secondly, that conciliation, from the point of view of the public, functions with complete success only when it is accompanied by investigation and publicity.¹⁴³ And it has taught finally that no machinery for the settlement of labor disputes is complete which does not afford the public an opportunity to safeguard its interests. Experience, therefore recommends an act in which conciliation is the functioning agent; in which compulsory investigation is an indispensable factor, and in which the public is adequately protected from the strike which may result in spite of the opportunities afforded for a fair and just settlement of labor disputes by conciliation and compulsory investigation.

The Transportation Act already provides the machinery for the type of act which experience recommends. The entire trouble

¹⁴²Experience in Australia seems likewise to justify conciliation rather than compulsory arbitration. Since 1910 when the Commonwealth arbitration act was amended to give the president of the labor court power to compel conferences, increasing stress has been placed on conciliation. (See 1918 report of the National Industrial Conference board.) And in 1920 an "Industrial Peace" Act was passed which "may be regarded as a sincere attempt to improve the machinery of industrial conciliation." (Unsigned article on Australia in the March, 1921, number of the Round Table.) This act makes provision for a Commonwealth council on which are six representatives elected by the employers, six elected by the workers and a chairman appointed by the Governor-General. It provides also that a district council of a similar nature may be named. Three excellent articles on the Australian court: A New Province for Law and Order. by Henry Bournes Higgins, in 29 Harv. L.R. 13, 32 Harv. L.R. 189, 34 Harv. L.R. 105, give clear accounts of the functioning of the Australia law.

¹⁴³See *supra*, Chapt. I, p. 478, footnote 59.

lies in the fact that the machinery is not functioning properly. The machinery for conciliation is found in the conferences provided for in section 301 and in the adjustment boards provided for in section 307.¹⁴⁴ But we saw that neither conferences nor boards are actually encouraging conciliation. Compulsory investigation is also provided for by the act which in sections 308 and 310 endows the board with complete inquisitorial powers. But compulsory investigation becomes a farce in the face of a docket of 1,300 cases. And, finally, in the labor board itself is found the machinery for the protection of the public interest. The board, however, instead of functioning as a court of last resort, is overburdened with the work of a court of first instance. The question now is, how can this available machinery be remodeled and strengthened in order that the act may achieve the results at which experience aims?¹⁴⁵

Conciliation can be vitalized by compelling the formation of bi-partisan regional adjustment boards. It is suggested that three adjustment boards, corresponding to adjustment boards, 1, 2 and 3 formed during the war,¹⁴⁶ be established in each of the three regional districts, and that these boards be charged with the duty of hearing all wage disputes as well as all disputes, arising out of the establishment of rules and working conditions. Conciliation can be further vitalized, and the public interest safe-guarded at the same time, by withdrawing from the disputants the privilege of appealing to the Labor Board and placing this privilege in the hands of two representatives of the public, who it is recommended, should attend all sessions of the adjustment boards.¹⁴⁷ The adjustment boards should be charged with the final determination of disputes over rules and working conditions, and only wage cases should be appealable to the Labor Board. For the problem of rules and working conditions, is, because of its extreme technicality, one that the carriers and their employees are

¹⁴⁴See *supra*, p. 553.

¹⁴⁵It will be impossible, because of the limits of space, to give any more than the bare outlines of the sort of act which the writer believes will function best in handling labor disputes.

¹⁴⁶Board of Adjustment Number 1 had jurisdiction over men connected with the movement of trains. Board Number 2 dealt with railway shopmen and Board Number 3 was charged with the adjustments concerning switchmen, telegraphers and clerks. *Bing, War-Time Strikes and Their Adjustment.*

¹⁴⁷It is added as a qualifying suggestion that these public representatives attend only those hearings which involve wage disputes. It is possible that there might be a public interest involved in a change of rules, however, and in such cases the public men should attend.

best qualified to settle; and if, moreover, the Labor Board is to function successfully in wage disputes, it should not have its calendar glutted with hundreds of technical cases. Finally, the act should specifically forbid strikes or lockouts pending the hearings before the regional boards, and should command, also, that in cases where settlements are not reached by the regional boards, the status quo be maintained pending a further hearing by the Labor Board, and a decision.

In order that investigations may be complete and thorough-going it is recommended that a federal officer, endowed with the power to subpoena witnesses and demand the production of books and papers, be appointed by the president for each regional district. It is further recommended that this official have the assistance of a committee on which is represented the carriers, the employees and the public.¹⁴⁸ This official, in the case of wage disputes, should investigate the financial condition of the railroads, the cost of living in the district, rates of pay in other industries and the special hazards, skill or training involved in railroad labor which warrant a variation from the standard rate.¹⁴⁹ In the case of disputes over rules and working conditions he should make a study of the technicalities giving rise to the need for new rules or working conditions. The results of these investigations should then be submitted to the regional boards, and should form the basis of a settlement.¹⁵⁰

Compulsory investigation, accompanied by publicity will enable public opinion to exert a powerful force in favor of a fair settlement. In order, however, that public opinion may be even more carefully directed, it is suggested as noted above that two representatives of the public, preferably appointed by the president,¹⁵¹ sit regularly on the adjustment boards. These public representatives should have no vote. Their function should be, first, to question freely in order to bring out all facts and secondly to appeal wage cases to the Labor Board, first, when deadlocks

¹⁴⁸The public representatives on these investigating committees, would in all probability be appointed by the two public representatives on the regional boards.

¹⁴⁹The Railroad Labor Board in the present act is charged to take into account these factors, 41 Stat. at L. 456, 470 sec. 307.

¹⁵⁰The federal investigator might also be charged with the duty of investigating charges made by either side that the other side was not abiding by the settlements of the board.

¹⁵¹Men who are strongly allied in sympathy with either side should never be appointed to the positions of public representatives or regional boards. The public representatives, in order to best serve the public, should be unbiased and unprejudiced in their judgments.

occur, and secondly, when the settlement involves a compromise which places an unwarrantable burden on the public.¹⁵² Appeals should be accompanied by the recommendations of the public group, based on the findings of the investigating committee and on the facts brought out at the conferences.

The Railroad Labor Board, under this plan of reorganization, would function as a supreme court of review in wage dispute cases. Instead of itself instituting investigations as it does today, it would accept the "records" of the "lower court," and base its decisions primarily on these records, inaugurating only such additional investigations as it deemed necessary to formulate a just award.

It is suggested that this supreme wage court be constituted of nine non-partisan men thoroughly familiar with the economics involved in the establishment of wage rates. Such a court would be distinctly superior to the present labor board on which we noted practically all decisions are made in the last analysis by the three public men who have no intimate knowledge of the technicalities involved. Labor, which opposed a non-partisan court of "public" men on the ground that in such a tribunal political considerations outweigh justice, could not raise the same objection to a non-partisan court of eminent economists drawn from professional fields. For a court of men of this calibre would be primarily interested in handing down a decision in accord with the economics of the case. It is further suggested that these technical men be appointed by the president on the advice of prominent educators of the country. This would further remove them from political influence.

It is advocated, finally, that this supreme tribunal be endowed with the power to enforce its awards. Strong as is the force of public opinion, which is the only enforcing agent in the Esch-Cummins bill, it is not sufficiently strong, experience has demonstrated, effectively to protect the public against the strike danger. Provision must be made for some more potent force which can say to the railroads, "you must accept this award," and to the railroad employees, "you must not strike," before the public can be adequately insured against transportation tieups. The writer

¹⁵²In order to avoid deadlocks between two representatives which would prevent appeals, the act should provide that either representative could appeal a case to the Labor Board. The dissenting representative should, however, be permitted to file a "dissenting opinion" with the Labor Board in support of the decision of the regional board. The problem of the deadlock would arise of course, only in cases where a decision of a regional board was thought to be contrary to the interests of the public.

would not advocate endowing the Esch-Cummins Labor Board with the power to enforce its decisions. For labor would be justified in opposing compulsory arbitration that is not preceded by bi-partisan conferences which offer both parties adequate and well-protected opportunities to present their cases in detail and to reach a settlement between themselves. Neither labor nor capital, however, could protest on the grounds of justice compulsory arbitration which functions only after both sides to a dispute, assisted by compulsory investigation, have exhausted every effort to themselves settle their differences. If labor and capital cannot come to terms in such conferences as the writer has advocated, the public is entirely justified in demanding that the awards of the supreme court empowered to review wage disputes be enforceable in law.

Amended on the lines suggested above, the Transportation Act would be purged of its objectionable features and would be greatly strengthened as a strike-averting body. Compulsory investigation and bi-partisan conferences would become the functioning agents in the settlement of labor disputes instead of arbitration, which would be held in reserve until labor and capital had clearly demonstrated their inability to come to terms. Arbitration, when resorted to, however, would be far more effective, since in the amended act the arbitration awards would be enforceable in law. No protection now afforded to the public by the Transportation Act would be destroyed by its amendment along the lines suggested. Instead the public, enlightened by compulsory investigation and fortified by representation in the original conferences would find in its own increased strength additional assurance against strikes; and should even the increased strength of public opinion be found incapable of averting industrial disturbances, the public would find that it was fully protected in a supreme wage tribunal which was authorized to enforce its awards.

No discussion of federal intervention in labor disputes is complete which does not include a reference to the vital need for effective federal intervention in the coal mine dispute. The coal strike of 1919 closed schools, hospitals and factories; it handicapped train service and caused suffering in hundreds of homes. The mine strike inaugurated in April, 1922, which remained unsettled until September, undoubtedly would have reproduced the suffering of 1919 had it continued many more months. As it is coal prices soared to such a height, as a result of the curtailed

supply, that many families suffered from insufficient fuel in their homes last winter.

Despite the fact, however, that the entire American public has a distinct interest in the continuous production of coal, the federal government has not yet established a right to intervene in mine disputes as it has intervened in railroad disputes. Congressional agitation for the establishment of a federal coal tribunal corresponding to the Railroad Labor Board and endowed with similar powers has become increasingly persistent however, following the recent serious mine strikes.¹⁵³ The position of the congressmen who are urging a federal coal tribunal, is strengthened by a suggestion made by Attorney-General Daugherty that since fuel is indispensable to transportation, the government has the same authority to prevent interference with the production of coal as it has to prevent interference with transportation itself.¹⁵⁴ It is certainly possible that the commerce clause will be interpreted, before long, to sanction congressional regulation of coal mine disputes. Since the majority of serious disputes in the mine fields center about opposition to unionism and unwillingness of the operators to bargain collectively with the miners, compulsory conferences which would force the operators to recognize the union and the collective bargain should be the first aim of a federal act regulating mine disputes. Compulsory investigation, public representation in local councils and a federal coal tribunal are the other features for which a mine disputes act should provide. The awards of the federal coal tribunal, like the awards of the suggested supreme railroad wage board, should be enforceable in law.

The coal mining industry is at present under investigation by a federal coal commission.¹⁵⁵ This commission, which made its first report, (incorporating in it information relative to wage rates, earnings, employment, costs and profits of the industry, competition of other fuels, and coal produced by non-union mines) last January, is "seeking to promote industrial peace by ascertaining and publishing certain facts." It is interesting to note that the commission in making this report, after commenting that "the public interest in coal raises fundamental questions of the relation of this industry to the nation and of the degree to

¹⁵³Note Senator Kenyon's proposal, *New York Times*, April 28.

¹⁵⁴See statement by Daugherty, relative to April 1922 mine strike and the government's right to intervene. (*New York Times*, March 22.)

¹⁵⁵This commission is composed of John Hays Hammond, Thomas Marshall, Judge Samuel Alschuler, Clark Howell, George Otis Smith, Dr. Edward T. Devine and Dr. Charles P. Neill.

which private right must yield to public welfare," observes that "it may be that both private property in an exhaustible resource and labor in a public service industry must submit to certain modifications of their private rights, receiving in return certain guarantees and privileges not accorded to purely private business or persons in private employ." A long step toward the final settlement of the mine dispute problem would be taken if congress, acting in accord with this sentiment, would recognize mining as a public service industry subject to regulation by the government, and provide for the type of collective bargain and investigation suggested above.

Summarizing the results of the foregoing investigation of the extent to which the federal government has established its right to interfere in labor disputes, it is evident that the government has, by 1923, developed extensive powers of intervention. In the Transportation Act of 1920 it has secured for itself the right to hear and decide all disputes involving interstate railroads. It has reached out into the field of local disputes through the conciliation division of the Department of Labor, and, with the injunction it is intervening in disputes which indirectly interfere with interstate commerce. The present system of federal intervention, however, is weakened by two serious defects. In the first place it is incapable of protecting the public from the mine strike, except extra-legally. In the second place it is overlooking the importance of mediation and conciliation, and is relying too completely on arbitration and the injunction, both of which are distasteful to labor. The government may correct the first defect by assuming jurisdiction of the mine dispute under the commerce clause of the constitution. The second defect may be remedied by encouraging, through an amended Transportation Act, collective bargaining instead of compulsory arbitration, which as noted above, should be retained only as a "last resort" remedy.

A system of federal intervention which extends to mine disputes as well as to railroad disputes will ensure greater industrial peace. A system of federal intervention, for both rail and mine disputes, which is based on the collective bargain, but which protects the public against the strike that may result from deadlocks in the bi-partisan conferences; a system which grants to labor and capital a full opportunity to settle their own disputes but provides for a supreme court of review to safeguard the public against the misuse of this opportunity—such a system will ensure an industrial peace which will be based on industrial justice, justice to labor, to capital, and to the public.