APPENDIX

For the possible assistance of those who may find occasion to study the application of the National Labor Relations Act of July 5, 1935, or any similar federal legislation, to industrial activities which are claimed to be purely local in character, this Appendix deals with oral arguments presented by counsel in four of the cases reported earlier in the volume. The cases and the arguments are arranged in the order in which they were heard. The attempt is to set forth, by summary and by direct quotation, what was said concerning the principal issues of law. Space limits have required much condensation, especially of later arguments involving points argued previously by other counsel. What purports to be a full transcript of all will be found in Sen. Doc. 52, 75th Cong., 1st Sess.

Associated Press v. *National Labor Board,* 301 U. S. 103

Mr. John W. Davis, on behalf of the Associated Press, after stating the case:

"This case does not turn in any sense on the subject of collective bargaining, its merits, or its demerits, its wisdom or its unwisdom, its blessings or its injury, its virtue or its vice, or on the right and power of laborers of all characters to unionize for common purposes if they see fit. The right to combine for such a lawful purpose has in many years not been denied by any court, said Your Honors in *American Steel Foundries* v. *Tri-City Trades Council,* 257 U. S. 184, and not since the antique doctrine that a combination of men to raise their wages constituted an illegal restraint of trade finally perished from the reports has the right itself, so far as I know—the right *per se,* the naked right—been denied by any

judicial tribunal in this country. It may be abused, no doubt has been abused, but its existence does not derive from any declaration contained in this statute or in any other, because it antedates the statutes and was the subject of judicial recognition long before this Act or any similar Act was passed.

"What is involved here is the power of the Federal Government to make collective bargaining compulsory in all the industries of this country. We challenge that power.

"This case does not turn, in the second place, on the question whether or not the Associated Press is engaged, as to some of its activities, in interstate commerce. Some of its activities may be conceded to constitute interstate commerce. It is equally clear, as we think, that some of its activities do not constitute interstate commerce, and we think it to be clear that, as to its editorial employees, their duties are no more interstate commerce than those of a draftsman engaged in drawing plans for a steel mill or those of the tenders of looms in a textile factory.

"And, in the third place, this case does not turn upon the reason or unreason of Watson's discharge. There was nothing about his discharge which could give any right of action, this Act aside. He was an employee at will, for no fixed term, and both he and his employer had the right, at law, to terminate that relationship whenever they saw fit, without incurring any financial or other responsibility. Neither was it such a relationship as a court of equity could have enforced; for, of course, the doctrine only needs to be stated that a court of equity will not enforce a contract for the performance of personal services. . . .

"We assert that the Act is not a valid exercise of the commerce power, either in general or in its application to the Associated Press. We assert that the Act by its scope outruns the commerce power and is an effort to

regulate matters that fall far outside of the field, and that this appears in the Act itself, from its preamble, from its definitions, from its operative or effective sections, and from its legislative history. I think there shines through the Act a clear and studied purpose on the part of Congress to bring all the industries of the country, as far as language can accomplish it, within the reach of the supervision of the National Labor Relations Board. . . . The recital of purposes and reasons is coextensive with the entire industrial and commercial life of the country, and no regulation, presumably, which could attain that end could possibly reach these objectives unless it were all-inclusive. Regulations devoted only to those employees who could be found to be engaged in the act of interstate commerce could not alone preserve the economic level of the country or prevent this alleged injury to the general market and the maintenance of prices. . . .

"An employee who has been wrongfully discharged remains an employee under the terms of the Act until he has found another job."

The definitions, 'employer,' 'employee,' 'commerce,' 'affecting commerce,' and 'labor dispute' reveal the effort to include in the Act all the industries of the country. Under § 8, an employer dare not even make a contribution to a union of his employees, no matter how independent it may be; he can not let them confer with him, without their losing time and pay—unless permitted by the Labor Board. "That covers, of course, the whole life of the employee. There must be no discrimination as to hire or tenure or any condition—no shift of work, no assignment from one shop to the other, if there is an underlying purpose thereby to encourage or discourage membership in any labor organization. It confers, as the Circuit Court of Appeals of California has said, and

undertakes to confer, a civil-service status upon every employee so that whenever there is any shift in his relationship toward his employer, he may assert a coercive purpose and may take his case before the National Labor Relations Board or its divisions. The employer may not discharge his employee because of his membership in an organization. He may not discriminate against him because of his membership in a labor organization. But he may make a contract with the labor organization by virtue of which he will discriminate against those who are not members of it. In other words, there is an open declaration, we think, that the purpose of the Act is to make the closed shop universal and compulsory. In these effective clauses there is no phrase confining the employers and employees intended to those engaged in interstate commerce.

"The next section of the Act provides for representatives and elections. The minority who do not belong to the unit selected as the exclusive agent for bargaining but are to be bound by it nevertheless, either individually or as a group, have preserved to them the right of petition—and nothing more—for under the terms of the Act the contract which is made by the selected majority is binding upon them and upon their employer as well. The unit for collective bargaining is to be selected by the Board, and no standard is set up by which the Board may exercise that duty of selection; no guide is offered to them in deciding what is the appropriate unit, whether it is the factory unit, or the trade unit, or the craft unit, or the plant unit. The Board is given uncontrolled discretion to name the unit appropriate, and, when the unit has been named, a majority of that unit binds everybody in the plant.

"The learned Solicitor General insists that, in reading the Act as I have just done, and as we read it in our brief, we are entirely too literal about it; that the Act

bears a construction more benign than we would give to it; that we must start with the assumption that Congress did not intend to exceed its jurisdiction over interstate commerce, and that there are lodged in the Act here and there technical phrases upon which that construction can be based. Whether that construction would save them in this case is a question I shall come to in a moment. But as to the all-inclusive character of the Act, it is asserted that the definition defines interstate commerce in the orthodox terms. It then passes on to a section in which they undertake to define 'affecting commerce,' being careful, however, in that definitive clause not to use the words 'directly affecting commerce.'

"And finally we come to section 10 (a). . . . The employer and employee can no longer set up their own arbitral machinery. The power of the Board is to be exclusive. In that there is the phrase 'prevent any person from engaging in any unfair labor practice affecting commerce'—not 'directly affecting commerce,' not 'affecting commerce' as that phrase has been defined by the prior decisions of this Court. And if we want any light on the subject as to what, in the opinion of the Board, is to be the interpretation of that clause, we only have to turn to their decisions. That clause, says the learned Solicitor General, imposes upon the Board a duty to inquire, in each case, whether the dispute does or does not affect commerce. It is left to the Board, by what he is pleased to call an *ad hoc* application of the statute, to determine whether the instant controversy is within or without the congressional intent.

"But as for producing industries in the country, the decisions of the Labor Board, which are now available in printed form as a public document, demonstrate that the only test the Board has ever applied as to whether any controversy, large or small, affected commerce, was whether the raw materials of the industry, in whole or

in part, were drawn from without the State, and whether the finished products, in whole or in part, were shipped without the State after they were finished. Wherever the Board has found those circumstances to exist, it has declared, as the basis of its jurisdiction, that it has detected a flow of commerce; and as you read the decisions of the Board, you can only conclude that the word 'flow' is to them the grand omnific word that disposes of all their doubts and controversies, and wherever they find any prior or any subsequent movement in interstate commerce, they describe the result as a 'flow,' and they proceed to adjudicate. . . . I make no complaint of the triviality in many of these cases. If this law is a law at all, it must apply to the great and the small alike. If this theory of interstate commerce can support this sort of intrusion, then it must be clear that no workman in the United States in any of its productive industries, can be discharged, or even the terms or place of his daily labor altered, without a hearing before the National Labor Board. The very magnitude of the probable task ought to be enough to make men of average humility shrink from its assumption.

"The universality of this Act, reading its preamble, reading its effective clauses, is its very bone and sinew, and it appears so from the reports of the committees of Congress that had it in their charge. As a regulation of commerce we are to penetrate into the economic life of the country and undertake to preserve the 'balance of economic forces' upon which the full flow of commerce is said to depend.

"If the Act lacks the universality that I assert, a universality which must be necessarily fatal to it; if it admits the construction which the learned Solicitor General would put upon it in order to preserve some part of its efficiency, will that construction, applied to the instant case, make out of the relations between the Associated

Press and its editorial employees anything that, by the remotest stretch of the human imagination, can be considered commerce between States?

"I take it that there are some axioms which have settled into the jurisprudence of this country too firmly for disturbance. I take it that no man will pretend that the power of Congress is not confined to interstate commerce and those matters which directly affect it; that interstate commerce itself is an act performed, as one of the decisions said, by the labor of men with the help of things, and that it is only when men are engaged in the act itself, or when they are engaged in activities that directly affect the performance of that act by others, that they come within reach of the federal power.

"I suppose, contrary to what one sometimes hears, that no one will seriously try to argue in this Court that the right to engage in interstate commerce is a privilege and not a natural right, antedating the Constitution as it does. It is not to be granted or withheld at the mere will and pleasure of Congress. It is to be protected against interruption. It is to be guided by rules appropriate to its exercise, and its abuse by acts which would be injurious to the pubic welfare is to be prevented.

"So far, and no farther, as I contend, can the Congressional power extend.

"What is the pedigree of necessity that they think supports the Act so far as the Associated Press is concerned? They say the Associated Press is engaged in interstate commerce. This Act regulates the Associated Press. Therefore, this Act regulates interstate commerce. And, if the faint glimmerings of my collegiate logic remain with me, I think that syllogism has the fallacy of the undistributed middle. The Associated Press is engaged in the dissemination of news. The dissemination of news constitutes interstate commerce. News cannot be disseminated unless it is gathered. News after it is gathered

cannot be used until it has been written. Editorial writers are necessary both to edit and to gather the news, and, if no news is gathered, no news can be transmitted. Editorial writers, being like most artists, perhaps, temperamental, must be of a contented mind before they can efficiently perform their duties. A contented mind can only be based upon satisfactory working conditions, hours, and terms of payment. Satisfactory working conditions, hours, and terms of payment can only be brought about by collective bargaining. Ergo, to force the Associated Press to engage in collective bargaining is a bona-fide regulation of commerce.

"That, I respectfully submit, is nothing but a repetition in argumentative form of the nursery rhyme about The House that Jack Built. . . .

"I repeat what I have said before, and what I shall perhaps repeat in another branch of this argument: The Associated Press is not an instrumentality of commerce. It is not a railroad. And I shall not enter at all into the scope of the Congressional power in regulating the labor relations between the railroads and their employees. They, it may be said, are dedicated, by their being and by their consent, to a continuous public service, and it may be that anything necessary to preserve the continuity of that service, which is the law of their nature, is within the power of the regulatory body. But there is nothing of that sort with this Associated Press here. It is not a carrier for hire.

"These editorial employees are engaged—in the court below I used the phrase 'in the manufacture of news,' and the double implication of that word caused me some embarrassment. Therefore I do not use that phrase here. They are engaged in the production of news, in its obtainment, in its formulation, in its preparation—as truly a productive energy as that of the roller in the steel mill, or the herder of cattle on the western plains, or the agricultural laborer on his farm.

"Of course, the Government is driven to some very old means in order to sustain its contention on this subject. We hear again of the 'throat' cases, *Stafford* v. *Wallace,* 258 U. S. 495, and the rest. We hear of the railroad case, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. We hear of the strike cases, *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, and so forth.

"Your Honors are so familiar with that that a word in differentiation would indicate our point of view. There is no 'throat' here. There is no 'current' here. We do not sit like the stockyards, astride a current of commerce which other men are trying to conduct, and which, by the Stock Yards Act, they were forbidden to interrupt. This is our commerce, and what this law proposes when applied to us, is to regulate us, not in order that we may be prevented from interrupting the commerce from other people, but to regulate us in order that we may be prevented from interrupting our own business—which is a horse of a very different color.

"The railroad cases stand on their own footing. I was interested to notice the effort made by the learned opponent's brief to bring the doctrine of the strike cases to the support of this Act. In the strike cases, as Your Honors have pointed out, there was a clear intent to interrupt interstate commerce, and interstate commerce was the object of attack. Here is the reasoning by which this Act is supposed to bear on that situation. 'Consequently,' says my learned friend, where the situation in a particular enterprise—and this Act, if I am right, embraces all enterprises—'presents a reasonable likelihood'—there is no question here of certainty or inevitable result—where the situation in a particular enterprise presents a reasonable likelihood that a dispute, if it occurred—and we are supposed to imagine a dispute occurring—would involve an intent—this hypothetical

dispute would involve a hypothetical intent to restrain commerce—then the Board can apply the statute to that enterprise.

"There is a chain of hypotheses. You must first hypothesize a reasonable likelihood. You must next imagine a dispute, and, as a third hypothesis, grounded upon the other two, you must imagine that those who engage in the dispute would have an intent to restrain commerce, and, then on that hypothesis, you take possession of the enterprise and regulate it.

"So much for the interstate commerce features of the Act, which I lay aside.

"The second point is that the statute is a direct violation of the Fifth Amendment, and it is so because it is an invasion of freedom of contract between an employer and an employee who are engaged in a wholly private occupation, as to which invasion no emergency exists, or is so much as alleged. It is a sweeping undertaking to regulate the right of men to sell their labor, and the right of men to buy.

"We understood that under *Adair* v. *United States,* 208 U. S. 161, *Coppage* v. *Kansas,* 236 U. S. 1, and *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, the power of the legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and his employees is direct and is assumed when the business is entered upon. That is the criterion. And in normal relations between employer and employee, no Government, on the Fifth Amendment standard, can undertake to step in and make contracts in their name.

"We assert that the Act is bad under the Fifth Amendment not only because it imposes this compulsory collective bargaining, from which all permissive features have been removed; not only because of its scope; but because of the methods to which resort is had.

"The learned Solicitor General says that that question is not in this case; that we are not concerned with the compulsory bargaining which the Act undertakes to provide, because that hand has not yet been laid upon us; that we are only entitled to concern ourselves with the discharge of this particular employee and the demand for his reinstatement.

"To which our answer is, first, that the Act is an entirety; that it is impossible to read the Act and conclude that it is susceptible of any separation; that the whole declared object and purpose of the Act fall unless compulsory collective bargaining is attained. Furthermore, in the order which the Board entered against us, requiring us to reinstate this employee, it also required us to abstain from restraining, interfering with, or coercing him in his right to bargain collectively, as declared by section 7 of the Act. . . .

"But let me indicate what are the specific points on which we think these provisions of the Act are arbitrary and unreasonable.

"The first is that the employer, and the employer alone, is bound by this mandate. It is only the employer who can be compelled to bargain. No such mandate is laid on his employees or upon any association or union they may choose to form. On the contrary, not even is the duty of observance, after a bargaining has been had, laid upon the employees, for the thirteenth section of the Act specifically provides that 'Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.'

"If the collectively bargaining employee refuses to collectively bargain, he has lost none of his rights. He is given the collective right to strike whenever and wherever he sees fit.

"It is arbitrary on the subject of the majority rule. After a unit has once been chosen the vote of the major-

ity of that unit makes it the exclusive bargaining agent. That is sought to be defended on the ground that that is democracy; that the system of majority rule is one to which in this country, under our democratic institutions, we have become thoroughly accustomed, and for which there is no substitute, and therefore, say the proponents of this Act, it is quite normal and proper to write into the Act that a majority shall control for all.

"But the analogy, if the Court please, is utterly lacking in foundation. Majority rule prevails under democracy in matters of government solely because no other organ has been found by which a democracy may express its will. There is no other method under a democracy by which the officers of the Government may be peacefully chosen, except by an acquiescence in the will of the majority. It is an integral part of democratic government *ex necessitate;* but there is no reason, *ex necessitate,* to make it a part of the dealings of individual men with their individual rights of person and of property. There is no reason, because a man is compelled by the very existence and form of his government, to yield to the majority, why he should be compelled, against his will, to appoint some other agent to dispose of his own individual rights. When a law undertakes to deprive a minority, large or small it matters little, of their right to contract for their own labor under their own terms and their own conditions, the Fifth Amendment is clearly invaded.

"It is not a thing of which the employer has no right to complain, because, of course, to deny the minority the right to deal with the employer is to deny to the employer the right to deal with the minority. . . .

"I have referred to the closed union shop. I have referred to this arbitrary selection of bargaining units. I have referred to the outlawing of company unions. I pass that whole subject to go on to what seems to me

perhaps the most important subject I have to present on this argument.

"I assert this Act, as applied to the Associated Press, is a direct, palpable, undisguised attack upon the freedom of the press.

"Let me remind Your Honors of the nature and character of the parties involved in this controversy. The Associated Press, it is true, publishes no newspaper; but, as the Government has been at great pains in its brief to demonstrate, it is the largest of the news-gathering agencies of the country, and its activities are Nation-wide. It supplies, under contract with its members, a very large part of the news they furnish the reading public of America, and under contracts which require them, if they take it at all, to take it as the Associated Press gives it, and, so much as they publish, to publish in that form, with credit to the Associated Press. . . .

"The Associated Press, so far as the news columns are concerned, is as integral a part of the press of the United States as the Washington Post or the New York Times. Indeed, without derogating from any individual publication, it may be said to be far more important than any one of them. There is no agency in this country that surpasses it. I question greatly if there is any agency in this country that equals it in its furnishing of information to the American public.

"Who is Watson? Watson was not a mechanical employee. He was not a telegrapher, whose only function is to send over the wires what is given him. He was not a man to whom manuscript was sent, and who had nothing but a mechanical function to perform in connection with it. He was the writer, the reporter, the rewriter, the composer of headlines. As he himself said, he wrote the 'leads.' As I understand, that in newspaper terminology means the opening paragraphs of a story where they are supposed to give you the whole gist of it, for tired busi-

ness men, in a few sentences. . . . Some epigrammatist said: 'If I may write the songs of a nation, I care not who makes its laws.' And I think it might be said, in the newspaper world, 'If I write the news of the nation, I care not who writes its editorials.' I think we might press on from that still farther and say, 'If I may write the headlines and the leads of the news, I care not who writes the rest of the two-column story.'

"That is the business in which Watson was engaged. It is proposed to say to the Associated Press, 'You cannot put somebody else in that chair. You must take Watson and Watson's work and Watson's selection, and broadcast that over your channels of communication throughout the United States.' Is that an invasion of the freedom of the press, or is it not?

"What is the freedom of the press? Why, the learned Solicitor General says in his brief, a newspaper publisher does not have a special immunity from the application of general legislation, nor a special privilege to destroy the recognized rights and liberties of others. And of course he does not, and who would so contend? But he does have a right to live under the law, and the supreme law is that the press shall be free—not partially free, not free within the discretion in this or that public officer; but free—not only free from advance censorship which says what shall be published or how much, but, broader than that, he shall have the right to formulate and disseminate the news of the day to the people of the United States so long as he does not invade the laws of libel or incite to some form of crime.

"Nothing less than that can be said to be guaranteed by the freedom of the press—not as a privilege to the newspaper owner; not that he may stand in a class apart from and above his fellows; but—as Your Honors have said, 'If we fetter the press, we fetter ourselves'—in order that democratic government may be fed with the only

thing which can keep it alive. The Constitution forbids the invasion of this field.

"I need say no more in defense of the doctrine. What about its application? They say that our only complaint of any invasion is that Watson would be biased as a labor-union man in the news he might collect, and therefore we rely solely on bias. . . .

"It is not that he may be more biased, not that he may be less biased, but it is that those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. You cannot divorce, in this sense, the author from his product. . . . What is written is the news, and the man who writes it is utterly inseparable from it. . . .

"Can the newspaper be free if it is not able to choose between authors? Suppose one of our dictatorial neighbors in Europe should say . . . to the newspaper publisher, 'You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party; you cannot dismiss him for that reason,' is it conceivable that that would leave the press free? . . . Indeed, what more effective engine could dictatorial power employ than to name the man who shall furnish the food of facts on which the public must feed?

"Another illustration: The Fifth Amendment forbids the establishment of a religion or any law prohibiting the free exercise thereof. If some legislative body were to enact that no congregation, no administrative, ecclesiastical agency set up under the church policy, could dismiss its minister because, forsooth, he had joined the Ministerial Guild, would that prohibit the free exercise of religion? Would it diminish the right of free exercise of religion if the congregation were robbed in any degree of the right to select the minister of their choice? . . .

"How can one remain the master of the operation of his business if his right to hire and discharge is qualified in

any way whatever other than by his own voluntary contract or by an employment at term? How can a newspaper remain the master of its business if the right to select those who compose its editorial page—and even more important, as I insist, from the standpoint of the effect upon the public at large, those who shall compose its news columns—is no longer within its choice? A man who is publishing a labor journal has a perfect right to do it. He has a right to make that journal just as partisan in the interest of labor as he chooses, and if he is wrong about it, in our American theory, the truth must ultimately prevail. Can we say to him, without impairing his freedom, 'You shall not discharge any editorial or news writer or reporter simply because he refuses to join a labor union, simply because he is entirely out of sympathy with the cause you are trying to promote; you can discharge him for any other reason—the color of his eyes, if you please—but you cannot discharge him for that?' Would or would not that invade the freedom of the man who is publishing that journal?

"I put it in a sentence, if the Court please. The author, in this field, is the maker; and he and the thing made—the author and the product—are one and inseparable. No law, no sophistry can divide them; and if you restrict the right to choose the one you have inevitably restricted the right to choose the other.

"I submit that whatever may be said of this Act, whether it is as fatally inclusive as I contend, or whether there is a field where its operation may lawfully be effective, if there is one field which, under the Constitution of the United States, escapes congressional intrusion, that field is the freedom of the press, which the order entered here clearly and directly invades."

Mr. Charles E. Wyzanski, Jr., Special Assistant to the Attorney General, on behalf of the Labor Board:

". . . There can be no question but that not merely the transmission of news but the person whose news is trans-

mitted is in interstate commerce. [Citing *Gibbons* v. *Ogden,* 8 Wheat. 298; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650.] It has been settled, since *Caminetti* v. *United States,* 242 U. S. 470, that it is of no consequence so far as the regulation of commerce goes whether the person engaged in it is operating with or without a pecuniary motive. And, moreover, if it were necessary to show a pecuniary motive it would be easy to do so on the facts in the case at bar, for the Associated Press not only in its incidental contracts . . . operates for a profit, but its whole enterprise is for the benefit of newspapers which operate at a profit, and, as this Court recognized in *International News Association* v. *Associated Press,* 248 U. S. 215, the members do operate at a profit, and presumably the money which they contribute to the Associated Press they recoup out of the profits of their own enterprise.

"The second distinction which is attempted to be made is that this enterprise does not hold itself out to serve the public, and hence is not subject to regulation under the commerce clause. A sufficient answer to that contention is supplied by the case of *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296. Moreover, it is very doubtful whether, even if there were any doctrine such as that for which the petitioner contends, the petitioner would be within it; for, though it does not hold itself out directly to serve the public, it does serve its members, who in turn serve the public. Incidentally, it is to be remembered that the Association Press communicates not only with itself but with its members, and the dealings between the corporation and its shareholders are not to be regarded as dealings by the corporation with itself. There are a number of cases which hold that, even where a person is engaged solely in dealing with himself, he is within the scope of the regulatory

power of Congress under the commerce clause. E. g., *United States* v. *Simpson,* 252 U. S. 465, and *Pipe Line Cases,* 234 U. S. 548.

[Counsel then explained the character of the man Watson's employment.]

If a filing editor is not *sui generis,* he resembles more closely the man who dispatches freight and determines how much baggage shall go on a train, than a factory worker, for his duty is to determine how much shall go over the line and to keep the line balanced.

Not only are these employees often themselves in commerce, but they are constantly about commerce. If they were to cease their work there would be an instantaneous dam to the flow of business. There can be no question that these employees with respect to this company are much closer to commerce than the stenographers, janitors, and filing clerks, who were held in the *Texas & New Orleans* case to be within the scope of the commerce power.

"But even if these employees are not regarded as themselves in or about commerce, we submit that they stand at the heart, or at the very nerve center, of a well-defined stream or flow of commerce. . . ."

It has been suggested that the flow, if it exists, stops at the teletype machine. There is a decision in this Court to the contrary. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105.

It also has been suggested . . . that the "flow of commerce applies" only where somebody else's goods are passing through some public market. See *contra, Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453.

Petitioner says that the flow of commerce doctrine cannot properly be applied, because there is no single focal point through which everything passes. . . . The Packers and Stockyards Act would apply not only to Chicago but to any similar market.

Is the statute as here applied a reasonable regulation of commerce? . . . There are involved in this case only the first and third definitions of unfair labor practices to protect freedom of association and freedom of representation. . . . It may be true and it certainly is the hope of Congress, that people once allowed freedom of association and freedom of representation will be able to agree upon wages, hours, and working conditions voluntarily and apart from any congressional or legislative edict; but the statute itself does not fix substantive working conditions.

[Counsel then explained at length the importance of free organization, representation, and collective bargaining to the avoidance of industrial disputes; the history and beneficial effects of railway labor legislation of Congress applying these principles; the reports of various federal commissions dealing with the subject.]

But it is said that these principles, though reasonable, bear no reasonable relation to commerce. We answer that the decisions in this Court are to the contrary, and we point specifically to a case not yet seven years old, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. [Counsel analyzed that decision in detail.] . . .

The contention that the principles embodied in the Railway Labor Act cannot be applied unless the enterprise is an instrumentality of commerce, ignores the reasoning which, from the time of *Gibbons* v. *Ogden,* 9 Wheat. 1, to the present, has been followed by this Court in subjecting instrumentalities of commerce to the power of Congress. The reasoning of this Court has been, we submit, as follows: Congress has the power to protect commerce from interruptions. An interruption of an instrumentality of commerce would interrupt commerce. Hence Congress has the power to protect the instrumentalities of commerce from being interrupted.

The power which existed in the *Texas & New Orleans* case is derived from a power to regulate commerce generally, as well as the instrumentalities of commerce, and there is no logical support for the position that what bears a reasonable relation to instrumentalities of commerce does not bear a reasonable relation to commerce itself. I am not talking, of course, about the questions which arise under the due process clause, which may be entirely different. . . .

Now, it has been suggested by the petitioner that this statute is defective in its relation to commerce on the ground that it covers only employer practices and on the ground that it does not outlaw strikes. We submit that Congress can deal with some causes of an evil without dealing with all causes of an evil, and that experience apparently justified Congress in finding that interferences by employers with employees' freedom of association and freedom of representation occurred more frequently than interference by employees with employers' freedom of association and freedom of representation. The fact that the statute did not cover employee practices therefore was justifiable on the basis of the experience shown before congressional committees.

The point is also made that the statute is defective because it does not outlaw strikes but merely deals with the causes. Every preventive statute deals with the causes and not with the evil itself. . . .

I have emphasized the fact that in this statute Congress is not governing the substantive terms of the employment contract. . . . Congress believes that those matters can be determined by self-government; and in order to protect self-government it has established the principles of freedom of association and freedom of representation. There seems nothing unreasonable in the belief on the part of Congress that working men, freely allowed to associate and freely allowed to select their representatives, will

choose, no less than employers will choose, to protect the free flow of commerce which is their common interest. . . .

Five circuit courts of appeals have agreed that the statute is separable and capable of application in some, if not in all, situations. Moreover, it was well known to Congress, to the Executive, and to this administrative board, that the statute would be applicable in some and not in all situations. The Senate committee pointed out that the exact ambit of the statute would have to be marked by judicial decisions. The Chief Executive, in approving the statute, emphasized the fact that this Act applied only where the practice burdened commerce and was not generally applicable.

"Affecting commerce," is defined in the Act as meaning "in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Now, that is the language of this Court, and the question is, What does it mean? We submit that it means first that a practice is within the power of Congress when it occurs in commerce, and also in three other general situations. . . .

We say that a dispute burdens or obstructs commerce if it is a dispute with an intent to affect commerce, or if it is a dispute that has a necessary effect on commerce, or if it is one of a recurring series of disputes which affect commerce. . . .

Mr. Charles Fahy, General Counsel, National Labor Relations Board, presented the argument for the Government on the due-process issue:

As to the first three practices listed in § 8 of the Act, which lend themselves to joint consideration, we submit that the decision of this Court in the *Texas & New Orleans* case has settled their validity as against any contentions which may be raised under the Fifth Amendment. . . .

It is submitted that petitioner entirely misconstrues the proviso to § 8, the so-called closed-shop proviso. The closed-shop agreement is a matter of contract. In the first place, it would seem that the only party who could be injured by it would be an employee and not the employer who might enter into the agreement; and the petitioner is not here representing any employee.

In the second place, the proviso does not encourage or foster the closed shop. The closed-shop agreement, being a matter of contract, is valid or invalid in accordance with the law of the State where it is entered into. . . .

I should qualify that, however, by saying that there are certain possible limitations placed upon the closed shop by the proviso, instead of any extension or fostering of it, because under the proviso the Board is not precluded from finding discrimination if the closed-shop agreement is entered into with minority employees or with the representatives of employees dominated and controlled by the employer in violation of other provisions of the Act; and it is clearly seen that such a closed-shop agreement might be considered the grossest form of discrimination prohibited by § 8 (3). . . .

Petitioner makes some particular objection also in its oral argument to the proviso that, subject to rules and regulations, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. That proviso follows the requirement that the employer shall not dominate or interfere with the formation of, or administration of, a labor organization. The reason for the proviso, if the Court please, was simply this: It was not the desire of Congress, of course, to prevent conferences between employers and employees. On the contrary, that was the central purpose of the Act. However, the permitting of conferences without loss of pay, on company time, unless

this proviso had been inserted, might have been construed to be the contribution of financial support to an organization.

We come now to the fourth unfair labor practice. But petitioner does not attack this provision of the statute, so I need not defend it. . . .

That brings us to the fifth and last of the listed practices which may be prevented and around which a great deal of the objections of the petitioner concentrates.

The fifth practice which may be prevented is the refusal of the employer to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). Section 9 (a) provides that in an appropriate bargaining unit where a majority of the employees select representatives they shall be the exclusive representatives of all the employees in that unit for the purposes of collective bargaining.

But this provision is not invoked against the petitioner in this case. The order in this case in no respect rests upon this provision of the statute. It is entirely separable from the other provisions, petitioner is not injured by it, and a decision on its validity would seem clearly unnecessary in the disposition of this case, unless it is so interwoven with the remaining provisions of section 8 that a decision on its constitutionality is necessary . . .

As for the provision of the order requiring the petitioner to make whole the discharged employee, the seventh amendment protects the right of trial by jury only in actions known to the common law. Obviously, this is not an action at common law. Here is a special statutory procedure to protect rights unknown to the common law. There is no private right here, in the discharged employee, for wages or damages. There is no right of action, even by the Government against the employer, for damages or penalty. Here is a public right enforced to protect interstate commerce, enforced by

cease-and-desist orders. The provision supplementary to this equitable remedy of cease-and-desist order permitting the restoration of the *status quo* is no more than was permitted by this Court in the injunction sustained in the *Texas & New Orleans* decision . . .

This statute provides in § 9 that where controversy arises as to representatives, a hearing on petition, as provided in the rules of the Board, may be had, and, of course, it is necessary, in determining the choice of representatives, that there be some bargaining unit. . . .

So a hearing may be had on that question, and the employer as well as the employee is entitled to participate and reserve all his legal rights for review by the courts. That hearing goes to the question of the appropriateness of a particular unit as a bargaining unit and the question of who, if anyone, are the representatives; which may make it necessary to hold an election, which is permitted under this section, and if the majority in the election designate representatives then those representatives become the representatives of all in that unit.

But before any proceedings could arise under section 8 (5) those representatives must seek to bargain with the employer, and they must be refused that right, and then, if so advised, they may file a charge with the Board of an unfair labor practice under 8 (5). Then the Board may issue a complaint and a notice of hearing, and then there would be a hearing on the question of whether 8 (5) had been violated, and the Board, perhaps, determined by what occurred at the hearing and by the testimony, might issue a cease-and-desist order.

Now, during all of those proceedings, including those involving the appropriateness of the unit and the election or designation of representatives, the petitioner would have the right to reserve all possible legal objections, and before any enforceable obligation came about he could have a review by an appropriate circuit court

of appeals, and in its discretion by this Court, to determine whether or not during any of these proceedings any rights of petitioner had been infringed.

It would seem clear that permitting the Board, on notice and hearing and the taking of testimony, to determine the appropriateness of the unit constitutes no unlawful delegation of authority, but is the kind of proceeding which this Court in the *Schechter* case referred to as "appropriate" when it compared the procedure, like this, of the Federal Trade Commission, with that of the National Industrial Recovery Act. . . .

Petitioner does not contend that the First Amendment lifts the commerce clause from petitioner or that a valid regulation of general application in the field of interstate commerce may not be applied to it, but it does contend that under this order the requirement of restoration of the discharged employee is a particular application of this statute which violates the freedom of the press.

Watson was not discharged for any reason having to do with the expression of news or the circulation of news. It is an established fact in this case that Watson was discharged because he engaged in activities in connection with the Guild, and the immediate cause of his discharge was his efforts to obtain collective bargaining with petitioner. . . .

If petitioner's contention is that, since the record in this case was made, Watson has become biased or undesirable, then it need not retain Watson. The order of restoration, of course, gives no continuing status to the employee, and it is not possible by any provision of this Act to give status of that sort to any employee. The provision of restoration is merely to restore a status disturbed for reasons proved in this record, which have nothing to do with the man's qualifications or the desire of the petitioner to express the news in any manner which it may desire. . . .

This statute imposes no terms of employment, it fixes no wages, it makes no agreements, it imposes no employee upon any one, except as a supplementary enforcement measure, supplementary to a cease-and-desist order to right a wrong *ab initio* which has occurred in violation of the statute.

The liberty claimed by the petitioner is really not the liberty that the Constitution protects against invasion; it is the liberty to interfere with and coerce and restrain others in the exercise of liberties which this Court has long recognized and characterized as essential. And all that the employer is asked to do under this statute, should the Court, after full judicial review, approve any particular order made under its terms, is to restrain the full and absolute exercise of its liberty so that by its side there may exist these essential liberties of the employees too; and this is done under this statute under the strong power of Congress under the commerce clause to regulate interstate commerce. . . .

Mr. John W. Davis closed the argument.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1

Mr. J. Warren Madden, Chairman, National Labor Relations Board, on behalf of the Board, after stating the case:

"The statutes and the Board's order were based upon the commerce clause of the Constitution, and so the question arises what had the respondent's conduct to do with commerce among the several States?

"Congress has found, and history and experience show, that the conduct of which the respondent was found guilty produces industrial strife.

"This Court, in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, has said that em-

ployees have a right to their union and a right to organize for the purpose of protecting themselves, and if the employer interferes with that right trouble may be expected. . . .

"The question for the Board was: Does this conduct of the respondent in this situation affect commerce within the meaning of the Constitution? If it does, it affects it within the meaning of this statute and the Board has a right to apply the statutes to the situation. Congress intended that the application of the law should be as broad as it constitutionally could be made.

"Obviously, in the administration of the law the Board must look to the decisions and opinions of this Court with reference to the situations to which it could constitutionally apply the law, finding exact precedents where it could, drawing analogies which seemed to it to be fair. . . .

"Except for the experience in the railway industry, the National Government's dealing with industrial strife has been only on a penal or control basis; that is, attempting to do something about it after the strife had broken out. This is a preventive statute. . . .

"We have no doubt that the National Government may take measures to prevent industrial strife reasonably likely to occur and of the sort that the Government could deal with if it actually did occur. The history of the Packers and Stockyards Act is an example. . . .

"We think the decisions of this Court approve the application of the federal power to the following situations involving industrial strife:

"(*a*) Where such strife involves an intent to affect commerce.

"(*b*) Where such strife has the necessary effect of substantially burdening commerce.

"(*c*) Where such strife is an example of constantly recurring industrial strife which is a burden upon interstate commerce.

"In this case there is a very considerable probability of a strike with intent to affect commerce. . . . But the National Government's power is not limited to cases of intent [to affect commerce. On the contrary, "necessary effect" may be just as valid a reason for the application of the commerce power as "intent."] *Industrial Association* v. *United States,* 268 U. S. 64; *Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457.

"The respondent's brief tells us: 'If this were a proceeding against striking employees under the anti-trust laws, the connection between strikes and stoppages of commerce might be legitimately urged as a reason for inferring an intent to restrain the movement of commerce, but here there is no actual or threatened strike such as the petitioner supposes to exist.'

[If a strike actually occurred, interrupting commerce, the respondent would go to the federal court and obtain an injunction under the anti-trust law; and yet, according to the opinion of the court below in this case, the very thing which caused the strike, and caused it immediately, would have had no relation to interstate commerce sufficient to enable the Federal Government to do anything about it.] . . .

"This doctrine, then, of 'necessary effect' as being the equivalent of 'intent,' is the doctrine of this Court. It is plain then that this Court has not placed any spurious and crippling limitations upon the constitutional grant of power to Congress to regulate commerce.

"Can there be any doubt that industrial strife in a stockyard which would stop the stream of commerce through that stockyard would be a proper subject for the cognizance of the National Government? . . .

"Now, it seems to me that the flow of commerce which is described in *Stafford* v. *Wallace,* 258 U. S. 495, 514, in those stockyards cases, was a flow of commerce not only through the stockyards but through the meat

factories, through the packing plants. The consequence is that the analogy which we draw of the flow of raw materials into and through, and the flow of finished products out of, the steel mills, seems to be a logical one.

MR. JUSTICE SUTHERLAND. "So far as the cattle are concerned, how far could you go? You say that that is an analogous situation?"

MR. MADDEN. "That is right."

MR. JUSTICE SUTHERLAND. "Taking it back, for instance, to the herder; suppose the herders raising cattle organized a union. Could Congress regulate that?"

MR. MADDEN. "I should say not, Your Honor. I should say that you have with reference to the commerce of the United States a problem somewhat similar to that which you have with reference to physical streams of water. The water after it becomes a stream gets a wholly different sort of protection from what it gets when it is surface water or when it is percolating through the ground. At that time it is practically any man's property and it has very little protection from destruction. When it becomes a stream, however, it then comes under the scope of a different set of legal powers. . . .

"Now, it does seem to me that by your own authority the meat factory is in the stream of commerce. The stream of commerce flows through it. I can imagine no reason why the Government, which has not only the right but the duty to protect that great flow of commerce, cannot protect it there as well as it can just before it reaches that point or just after it reaches that point. Indeed, it seems to me that the attempt of the National Government to protect its great streams of commerce is futile if there is somewhere along the stream a point where the hand of the Government is stayed and where stupid State regulation, or lack of regulation, may destroy the whole stream which the Government has so carefully conserved up to that point, and which it is going to pick up again and conserve so carefully beyond that point.

"I cannot see why the Government, which undertakes to protect this thing, should allow it to get out of control at some stage in the course of the stream and then perhaps permit it to be destroyed; which would be exactly what would happen, of course, to our enormous stream of raw materials coming into this steel mill and our finished products going out.

"If labor trouble should stop this mill, there is no question but that transportation would stop, communication would stop, boats would be tied at their docks, interstate orders and shipments could not be made.

"Now, why should the Government interest itself so meticulously in all of these things just before [the raw materials] enter the gates of this factory, and then allow the whole work of conservation to be lost while they are inside it?

"We no more assert that manufacturing is interstate commerce than did this Court in *Stafford* v. *Wallace* assert that meat packing, or soap making, or feeding hay to cows, is interstate commerce. We merely assert that the Government, which has the responsibility, cannot have the factory gates slammed in its face and be told, 'Inside here you have lost your control, and whatever happens to your great stream of commerce is none of the National Government's business.'

"A grave problem for this Court, of course, is the preservation of our very useful American system of dual sovereignty, but it does seem that where the United States has found its responsibility . . . to foster and protect the Nation's commerce . . . the States must give way to whatever means it develops as necessary. . . .

"Respondent cites a large number of state taxation cases. It seems to us quite evident that those cases have no bearing whatever upon the matter. . . ." [Citing *Stafford* v. *Wallace, supra,* and *Minnesota* v. *Blasius,* 290 U. S. 1, and distinguishing *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry.,* 249 U. S. 134.]

SOLICITOR GENERAL STANLEY REED, on behalf of the National Labor Relations Board:

"In the series of cases that we are now discussing we have a situation which requires that we give thought to the power of the Federal Government to regulate interstate commerce and to protect its flow, even though to do so it must reach into the industrial and manufacturing enterprises of the Nation.

"In the brief for respondent in this case an effort is made to discuss not only the precise issues which we conceive to be presented to Your Honors at this time, but also the entire theory of collective bargaining, its effects upon industry, and the right of the Government to interfere in the rather intricate employer-employee relationship.

"It seems to me that the same point of view was presented in the *Associated Press* case (see *ante,* p. 719)—that you were asked to consider not the particular instances that are before the Court in these cases, and not the particular sections of the Act which we shall attempt to bring before this Court, but the broad field of labor relations.

"Now, quite obviously, there are going to be many problems arising in the field of labor relations that will at some time be considered by this Court, but it does not seem to us that this Act, phrased as it is, permits the entire theory of collective bargaining to be raised in these cases.

"There are other provisions of the Act that are criticized. The section as to exclusive representation—that is not before the Court at this time. It is our position that this Act, which is a regulation and protection and control and encouragement of interstate commerce, undertakes to protect that commerce through dealing with those labor relations that directly affect that commerce.

"Whether that is separable from collective bargaining I do not intend to argue at length. I do, however, wish

to make this comment—that collective bargaining is not the ultimate end of this Act. It is phrased, of course, as a regulation of commerce. It is, from our point of view, a regulation of commerce. It deals with labor relations as they directly affect commerce. And in labor relations, as they are known today to all men, nothing is of more importance than the right of freedom of organization and the right to be free from dictation or coercion in that organization and the right to select representatives to deal with employers, whether through coercive collective bargaining processes or otherwise. . . .

"Regardless of collective bargaining provisions and regardless of provisions as to exclusive representation, this Act sufficiently manifests the intention of Congress—and the intent is the test of separability—that even though collective bargaining might be found to be contrary to the due process clause, certainly there is, nevertheless, sufficient virtue and sufficient good to be found in the provisions dealing with representatives, and with freedom from coercion or interference in the choice of those representatives or in the organization of unions, to justify their separate enactment.

"The legal principles, counsel for the respondent and ourselves would probably state in almost the same language. We do not contend, of course, that this Act is based upon any power except that derived from the commerce clause. They certainly would not say that due process requires that everyone should be left absolutely free from the power of government to protect the general good. It is in the application of those different theories that we find ourselves in disagreement. . . .

"Section 1 of the Act is based particularly on the proposition that the refusal by employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce.

"The last paragraph of that same section states:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of interstate commerce."

"As has been repeatedly said here, this Act is based on the commerce clause and on this declaration of policy in the Act. Moreover, the Act is limited in its application by § 10 (a) to conditions of industry or labor which directly affect commerce.

"Congress could have approached the problem in either of two ways: It could have dealt with each strike situation after it arose, or it could have had a preventive bill which sought to stop strikes before they started. The Sherman Act, of course, is one of the best examples of the prohibitory or punitive power of Congress. The Federal Trade Commission Act, the Grain Futures Act, and the Packers and Stock Yards Act are examples of the preventive power of Congress.

"It has never been thought by Congress, by the Executive, or by the Board, that this Act applied to all strikes or to all the causes of any strike. It applies only to labor situations that develop and affect commerce. The closest analogy to this Act has already been referred to from the bench. That is, of course, the Federal Trade Commission Act, in which practically the same language, of 'in commerce' or 'competition in commerce,' was used to outline the jurisdiction of the Commission.

"Section 10 (a) of the present Act deals with its application, and its application is precisely the same as the application of the Federal Trade Commission Act. . . . *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643. . . . This Act has the same procedural provisions as the Federal Trade Commission Act. . . .

"The theory upon which Congress has control and may regulate strikes with intent to affect interstate commerce

is quite clear and quite well known. We contend that Congress has an equal right to protect against strikes with the intent to interfere with interstate commerce, even when the strike has not taken place, or when the intent has not actually developed; that is, that Congress has a right to protect interstate commerce not only from the attack that has already gathered force, but also to go back into the causes that create strikes with intent. [Citing *Stafford* v. *Wallace,* 258 U. S. 495, 520; *Board of Trade* v. *Olsen,* 262 U. S. 1.]

"We say that the Board, when a case such as this is presented to it, has a right to go into the question as to whether or not there is a strike with intent, or evidence of a conspiracy to interfere with interstate commerce, or evidence of conditions that would reasonably be thought to lead to a strike with intent. We say that such an intent is very likely to be found in a wholly integrated organization such as we have in this case—one that begins in Minnesota and Michigan and runs through the whole stream of commerce that has been detailed to the Court. Many of the employees are actually engaged in transportation itself. The boats of this organization run down the Ohio and the Mississippi. It operates its own intraplant railroads and loads its cars by its own employees.

"Situations such as that which developed in *In re Debs,* 158 U. S. 564, can easily develop in these cases. . . .

"We do not rest our argument upon the question of intent, nor upon the ability of Congress either to protect the flow of interstate commerce from strikes with intent or to eliminate the causes that lead up to strikes with intent to interfere with interstate commerce. But we say that, from the decisions of this Court, as Congress might reasonably, and did, reach the conclusion that there were conditions the necessary effect of which was to bring about an interference with interstate commerce, it

had the right to protect that commerce from those conditions. [Quoting from *Coronado* case, 259 U. S. 344; *Industrial Association* v. *United States,* 268 U. S. 64, 81; and *United States* v. *Patten,* 226 U. S. 525.]

"Now, on the question whether or not the necessary effect of a strike or labor difficulty is to affect commerce, we think that the Board is entitled to take into consideration the mechanics of the particular industry against which the complaint has been made. . . . Citing *United States* v. *Reading Co.,* 226 U. S. 324. . . .

"I pass now to another factor, the size of the enterprise in its relation to the entire industry. . . . Where an enterprise is a large part of an industry, it is quite obvious that industrial disturbances in that particular enterprise have a large effect, whether or not they have a direct effect. Here we have an enterprise which is a large factor in the business of making steel. . . . The enterprise now before the Court is one of the most striking examples of an industrial stream of commerce. The details are before you: The commingling of the limestone and iron ore and the coal; the constant flow through the particular plants; the many people in the enterprise who are engaged in transportation activities; the close relation between the transportation facilities and the flow of the material; and the movement of the steel down the Ohio and the Mississippi to be distributed to the various consumers throughout the country:

"Whether or not that is a stream of commerce in the sense that the phrase is used in *Stafford* v. *Wallace,* 258 U. S. 495, and *Board of Trade* v. *Olsen,* 262 U. S. 1, I think is immaterial on this particular point. What we are saying is that this stream of commerce—whether or not it is a stream of commerce that is in and of itself subject to the regulatory power of Congress—which is so gigantic in size, and which reaches not only a particular locality, but also runs across State lines from the iron ore

production, from the limestone production, from the coal production, to distribution throughout the country, must be an important factor when we come to determine whether or not industrial disturbances in this particular enterprise are likely to or will probably interfere with commerce. Of course, disturbances in such an enterprise do disturb commerce.

"There is another factor that we wish to comment upon, and that is the recurrent nature of the strikes which have an effect upon interstate commerce, whether direct or not. There is no doubt of the magnitude of the effect upon interstate commerce. The problem is whether the effect upon commerce is direct. Just as Congress has the power to control strikes with intent and strikes the necessary effect of which is to interfere with commerce, so we contend that the recurrent nature of industrial disturbances gives further power to Congress to act upon such situations. . . .

"Of course, we do not contend that the mere continuous recurrence of difficulties is sufficient to give Congress power to regulate a particular industry, nor do we say that mere recurrence, in and of itself, is sufficient to give Congress power to pass Acts which undertake to eliminate the causes of those difficulties. It is only when those recurring practices are of a type that would come within the control of Congress, by repetition, by the danger of bringing about intent, by the danger of creating situations which will necessarily affect commerce, that the constantly recurring difficulties fall within the power of Congress. [Referring to *Stafford* v. *Wallace,* 258 U. S. 495, 520; the *Coronado* cases, 259 U. S. 344; 268 U. S. 295; *Loewe* v. *Lawlor*, 208 U. S. 474; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443.]

"In so far as recurrence is an argument for the exercise of the preventive power of Congress to protect interstate commerce, the fact that the recurrence of labor difficulties occurs in transportation does not place them any more

under the control of Congress than if they had occurred in industry. . . .

"In the present case we say that the record makes it very clear that we have a situation where there is a reasonable probability that strikes will develop with the intent to interfere with commerce; that if they do develop they will have the necessary effect of burdening and obstructing commerce. These facts, together with the recurring difficulties in the steel industry, the large size of respondent's operations, and its important place in the steel world, justify the finding on the part of the Board that the labor disturbances in this enterprise would affect commerce.

"That brings me to what I conceive to be one of the two important and critical questions in this case; that is, whether or not labor disturbances, in industries such as we are discussing here, so directly affect commerce that Congress has power to provide for their amelioration, if not their elimination.

"We are faced with the decision of this Court in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, in which you said that wages and hours and labor conditions in that industry were beyond the power of Congress because they had only an indirect effect upon interstate commerce, and that however great the magnitude of the effect might be, it was not sufficient to give Congressional power unless the effect was direct.

"We conceive that the *Carter* case turned upon the question of the purpose of the Bituminous Coal Act. The Court said that 'the primary contemplation of the Act is stabilization of the industry through the regulation of labor and the regulation of prices.' If that was the purpose of the Bituminous Coal Act, as stated by Your Honors, its aim was at a situation different from that which is sought to be cured by this Act. We do not seek to argue contrary to the *Carter* case. For the pur-

pose of this argument we feel that the *Carter* case may be taken, as stated by the Court, to be directed at the control of labor conditions and prices. We submit that when you considered the *Carter* case you considered it from the standpoint of the power of Congress to reach in and control a wage or a labor condition as a part of the scheme of stabilizing the industry which was undertaken by Congress.

"Here we have an Act with a different purpose, aimed at a different evil. It is merely repetitious for me to say again that this Act sought to control strikes which had the intent or the necessary effect of interfering with commerce, not the labor relations in and of themselves. The Act is not, in other words, directed at a regulation of wages or hours, but at the elimination of the causes of those types of industrial disturbances which this Court has repeatedly said were within the power of Congress. . . . It is not necessary that the *Carter* case should be overruled if this Act is upheld. Nor is it necessary to think that if we can go this far in protecting commerce from obstructions because of the power to regulate strikes with intent or with the necessary effect of obstructing commerce, that we need open the door to go farther into control of wages, or hours, or conditions of labor. It may well be that wages, or hours, or conditions of labor, as such, are beyond the power of Congress, because to interfere with them would be a violation of the due-process clause; or we may say that wages and hours are so distinct and separate from interstate commerce that they do not have a direct effect upon it under any circumstances, while here the rights of labor which are protected fit directly into labor conditions which result directly in interferences and obstructions to interstate commerce.

"I now pass from the question of direct effect on commerce to that of the due-process clause, in so far as this particular decree is concerned."

MR. JUSTICE SUTHERLAND. "Before you pass to that point, what is the primary effect of a strike in a steel mill? Is it not simply to curtail production?"

MR. STANLEY REED. "Certainly; that is one of the effects."

MR. JUSTICE SUTHERLAND. "Isn't that the primary effect, the immediate effect?"

MR. STANLEY REED. "Well, I should say it was the first effect. I do not mean to split hairs. Of course, that is one of the primary effects of it."

MR. JUSTICE SUTHERLAND. "That is the primary effect, to curtail production, and then the curtailment of production in its turn has an effect upon interstate commerce; isn't that true?"

MR. STANLEY REED. "As I understand it, no. The strike is something that . . . instantaneously and at the same time that it stops production stops interstate commerce. It is a single thing that happens, and that stoppage of works stops interstate commerce right at that instant."

MR. JUSTICE SUTHERLAND. "It affects interstate commerce just as the cessation of work in a coal mine. The primary effect of that, as suggested in the *Carter* case, was to curtail the production, and then the secondary effect which came from the curtailment of production was the effect upon interstate commerce."

MR. STANLEY REED. "Well, if we were undertaking to defend this Act on the ground that Congress had the power to regulate labor conditions as such, I would fully agree with what Your Honor has said, but our contention is that Congress is not undertaking to regulate labor conditions as such; that it is undertaking to protect interstate commerce from situations that develop from those labor conditions, and that the causes which lead to these strikes with intent, and to strikes with the necessary effect to interfere with interstate commerce, are within the regulatory power of Congress."

MR. JUSTICE SUTHERLAND. "If by some means you curtail the production of wheat, the immediate effect, of course, is to curtail the production of wheat, and that in its turn has an effect upon interstate commerce. So would you say that Congress could step into that field and regulate the production of wheat under the commerce clause or under some other power?"

MR. STANLEY REED. "I am sure that what I would say would not bar Congress on it, but it seems to me that there is a great distinction between whether Congress can regulate production as such and whether Congress can regulate conditions which might interfere with the transportation of agricultural products after produced.

"I will say this: That although this Act does not apply to agricultural production, probably, if Congress had undertaken to control situations that had for their purpose the stopping of such production, the same rule would apply. Fortunately, we do not have to reach so far in this case.

"The present decree directs that these parties cease and desist from interfering with the organization of their employees; that they cease and desist from discrimination in regard to their employees; that they restore to their places the men who have been discharged; and that they post notices. I direct myself now at the question whether such orders are a denial of due process. . . .

"We do not contend that the *Texas* case determines whether it is a violation of due process to require a man to be reinstated by an employer who has violated an Act such as the Railway Labor Act or this Act. . . .

"We do say, however, that it is consistent with due process to require reinstatement of an employee by an employer who has violated a constitutional Act and has interfered with the organization of his employees by discrimination against union employees in their discharge—we say that that, while not definitely and finally ruled upon by this Court, is within the due process clause.

"That brings me to a consideration of the second series of cases which, like the *Carter* case, I think are at the heart of this particular controversy. I refer to *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1.

[Here counsel sought to distinguish the two cases last-mentioned, comparing them with *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548.]

"Therefore, we submit that the *Adair* and the *Coppage* cases are not a bar to this Act; that whatever interference to the employee-employer relationship there is in saying that a man cannot be discharged because of his association with a labor union or because of the undertaking of the employer to destroy that union is different from that in the *Coppage* and *Adair* cases.

"It is our view that the interferences with the rights of employers which are implicit in this Act are interferences which, under the doctrine of due process so frequently declared by this Court, are reasonable and proper in their character and are not capricious. They are aimed at a situation which is within the power of Congress to control in protecting the commerce of the country from these recurring and huge dislocations arising from the various strikes that afflict the Nation.

"We leave to the employer all the natural rights which he needs to regulate and operate his business. He is not forbidden to discharge an employee. He is forbidden to discharge him for only one thing—his labor relations. The employer has great powers, of course. The employee has been permitted, and I believe that this Court has approved, unionization and collective bargaining and ordinary labor activities. The workman has been found to have rights—rights of organization to protect himself against the overwhelming material force of the employer. To ask the employer to give up but a trifle of the power which he has, to compel him to keep his hands from the

labor organizations of his workmen, is, in our view, not a deprivation of any liberty or property which is beyond a reasonable interpretation of due process."

MR. EARL F. REED, on behalf of the Jones & Laughlin Steel Corporation:

"The conclusion that the men were discharged because of union activities is based upon the flimsiest kind of evidence; what the petition really amounts to is that the Board did not agree with the superintendents of the Company as to the sufficiency of the causes for which they discharged the employees.

"The record abounds in hypothetical testimony, hundreds of pages of it. . . . Various persons came forward and said they believed that organized labor and national unions were a good thing for labor. The Board took judicial notice of theses written by professors in colleges about the advantages of union labor and of declarations made years ago—a vast mass of opinion evidence that national unions would be a good thing for workers. And it was not confined to the steel industry. They went into the producing industries. They offered college theses. They offered public records. They even offered a book as evidence to show that the stoppage of business and commerce was in large part due to strikes.

"It was on the basis of that testimony that the Board found that a labor dispute in the steel industry would interrupt commerce. This company was not shut down in 1919 when the labor strife occurred. It operated throughout. It has had no labor disturbance since 1892; but all these other intervening labor disturbances were used to show that they had a tendency to interrupt commerce. . . .

"It is suggested in the petitioner's brief that since the Act makes its findings on matters of fact final, and it has found that this disturbance had a tendency to interrupt interstate commerce, that is conclusive.

"Under *Crowell* v. *Benson,* 285 U. S. 22, and *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, it seems to me there can be no doubt that the jurisdictional question of whether or not this company is engaged in interstate commerce is one that we are entitled to have reviewed.

"The National Labor Relations Act, we contend, is on its face a regulation of labor and not any effort to regulate commerce among the States or to remove obstructions to commerce among the States.

"Mr. Davis, the other day (see *ante,* p. 719), went over the Act in some detail, and I do not intend to do that again. I do want to point out one or two things about the Act which I think were perhaps not sufficiently covered, which indicate that it is wholly an attempt of Congress to intrude itself into the industrial relations of what has been traditionally regarded as a State matter. In the first place, in the legislative history of this type of legislation the first effort that Congress made to regulate labor matters was in the original Railway Labor Act, which was reënacted and enlarged in 1926 and amended in 1934. Then in 1932 came the Norris-LaGuardia Act, which curtailed the power of the courts on certain labor matters. . . . The amendments to the Bankruptcy Act passed in 1933 and 1934 again attempted to endorse a national organization of employees, in that they prevented funds in bankruptcy matters and labor-organization matters being used in any way to contribute to the support of plant or local or so-called company unions.

"Now it cannot be said that Congress in the Norris-LaGuardia Act was trying to prevent the interruption of commerce by strikes, nor in the Bankruptcy Act. The real purpose there, and again in the National Recovery Act, was to regulate labor relations. And that is what they are trying to do here. . . .

"An examination of the Act itself reveals this. The closed shop is made legal. You cannot force a man not

to belong to a union, but you may force a man to join a union; and then you may not contribute any support to a local or plant union, no matter if it has been in existence for many years, no matter if you have a contract with it to pay a certain amount annually; and here is a form of organization of employees that has been successful in Europe, that has been existing in this country since 1904, and successfully in many places, and yet you are forbidden under this Act to make any contribution to it.

"To my mind, this indicates an effort on the part of Congress to force national organization in industry, to prevent local unions, prevent plant organizations, and compel employees to join national organizations. The provisions about the majority rule are for the same purpose. The Act says that no minority group can bargain at all. The minority union in a plant will not exist very long if it cannot obtain anything for its members, if it cannot negotiate with the management.

"The determination of the unit is entirely for the Board. Suppose the Board determines that the whole of the employees in the coal industry is the proper bargaining unit. You may be situated in a plant in which not a man belongs to that union, but you are bound by the determination of the majority, because the Board has found that that is the proper unit. The Board may have found that all of your employees are the proper unit, and not one of your electricians or mechanical men may belong to that unit. They may have their own union. Yet you are forbidden by this Act to deal with that group, because they are a minority group.

"Does that indicate a purpose on the part of Congress to free commerce from obstruction? Nothing of the kind. It indicates the congressional purpose to force national unions upon industry, and the Act is sweeping in its language. It purports to cover all industry, and it is exactly what was intended. . . .

"The fact that the Act is by its terms confined in application to matters affecting commerce does not change the situation. You cannot change the things which are not interstate commerce into things which are, by the use of words. If you say that it must be something affecting commerce, there is no limit.

"The question then comes to whether, in this particular case, the connection is direct or remote.

"The fact that we receive materials in interstate commerce or that we ship our products out in interstate commerce is not material. That is true of every manufacturing industry. The steel industry probably receives its products in a rawer form and gives a greater transformation to them before they are shipped out than almost any other industry. . . .

"I think the language of this Court in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, on what would be the effect of holding that prior or subsequent movements in interstate commerce bring the industry within interstate commerce, covers the situation better than any argument. . . .

"The Government argues that it is in the stream of commerce. I shall not go into that except to point out that in *Stafford* v. *Wallace*, 258 U. S. 495, and in *Board of Trade* v. *Olsen*, 262 U. S. 1, the evidence and the data before Congress showed focal points in which practically all of the commerce passed. This mill is not any way stationed in the stream of commerce. This plant, into which we take coal and coke and limestone and turn out steel, is not any mere temporary stoppage in a stream of commerce coming from the West to the East. It is not comparable; and because Congress could regulate stockyards, it is a far cry to say that they could regulate the labor relations of an industry like the steel industry.

"The Government argues that there is the possibility of an intention on the part of the strikers to obstruct

interstate commerce. It seems to me that that argument weakens the connection. In the stockyards cases, in *Swift & Co.* v. *United States,* 196 U. S. 375, the intent to obstruct interstate commerce was clear, proven. The stockyards were regulated on the theory that they might be used as an instrumentality in monopoly. But here the intention that the Government ascribes is an intention on the part of the strikers to interrupt interstate commerce, an intention on the part of a third party, an intervening agency. They do not claim that in discharging 10 men we had any intention of creating a controversy that might obstruct interstate commerce, but that these discharges might lead to dissatisfaction, which might lead to a dispute of more serious consequences, which might result in a walk-out, in which the strikers might have an intention to interrupt or change the stream of interstate commerce. If that reasoning is good there is no reason why Congress cannot regulate every activity relating to manufacture, [however remote its effect on interstate commerce]. . . .

"We raised before the Board, and raise now, the question of the violation of the Fifth Amendment. The case of *Adair* v. *United States,* 208 U. S. 161, decided flatly that a man had a right to hire whom he wished, and that a statute which forbade the discharge of an employee for union activities was unconstitutional.

"The same substantive decision was made in *Coppage* v. *Kansas,* 236 U. S. 1; and now it is said that the *Texas & New Orleans* decision, 281 U. S. 548, modified or at least cast some doubt as to those decisions. [Cases distinguished.]

"Now, in this case the order is made flatly that we reinstate these employees. . . . If this Act is valid, it means that when the 10 men come back they cannot be discharged except for a cause which would seem sufficient to the Labor Board. Certainly it does not mean that

they could be discharged right away, because the same complaint would be made again.

"The fact that these men were to be taken back and kept is evidenced by this unusual provision in the order. The Board ordered not only the restoration and the payment of the back pay, but that the company should post a notice that it 'will not discharge or in any manner discriminate against members of or those desiring to become members of Beaver Valley Lodge No. 200, Amalgamated Association,' and so forth. . . .

"Those men, if they can come back into this organization and go back to work for us, have a civil-service status. They stand differently from any other employee in our employ, because they cannot be discharged without a hearing.

"If their department shuts down, I suppose we shall have to go to the Labor Board and ask to reopen this decree. . . . Suppose they are tendered some other work that they do not want. . . . Under this decree we pay them back wages indefinitely, apparently.

"If we want to transfer the men to another department, then, I suppose, we must go to the Board and show them that we have good ground for transferring them. . . . Every time we want to promote a man we shall have to go to the Board to ask them to reopen this decree and let us do so.

"Now, an employer must have a discretion. He cannot always give a reason for a discharge. There are times when sabotage occurs, times when there is theft, and he cannot fasten the responsibility. There are men who are just a disorganizing influence and have to be transferred. There are men who have no promise of ability, who cannot either maintain or operate a machine, or who are a constant menace to their fellow employees. Is the discretion of the management to be reviewed every time the man discharged happens to be a

union man? Here are 22,000 employees, and 10 of them over 6 months discharged that happen to be members of the union, and we are hauled into court and have to show why we discharged those 10 men. Is that an interference with the right of freedom of contract, with the right to run our business as we think best?

"It seems to me that the Government's argument comes down to an economic argument. 'It would be a good thing if the Federal Government could control the labor relations of industry.' But that is not the law, and never has been. . . .

"For a century this Court has adhered to the simple, literal meaning which Marshall found in the commerce clause. It has given assurance to the States that their rights shall be as the Constitution fixes them. The taxing authority and the police power of the States have been protected, and the rights of individuals to maintain their own property have been protected.

"What the petitioner is asking is that the traditions and precedents of a century be cast aside, and that we change the meaning of the Constitution by a judicial decree, and say that things that for a century have not been the business of the Federal Government are now to be subject to its regulation, because of the remote possibility that interstate commerce may be obstructed."

National Labor Board v. *Fruehauf Trailer Co.*, 301 U. S. 49.

Mr. Thomas G. Long, counsel for the respondent, described the nature and history of the Trailer Company's business and explained in detail the manner in which it was conducted. The company paid the highest wages in the industry and for many years had had no disagreements with its labor until "legislation of this nature came along." Then came organizers, agitators fomenting disturbance.

He challenged findings of the Board touching the respondent's reasons for discharging the men who made the complaints, and touching the relations of the manufacture to interstate commerce. When materials come into the shop they are generally placed in inventory or stock and remain there from one to four months before being incorporated into a finished product which is shipped away. The seven men who were discharged were engaged in manufacturing the "raw materials" into the finished products that were sold. There is no "immediacy" of connection between the making, which is local, a purely intrastate matter (*Minnesota Rate Cases*, 230 U. S. 352, 410-411) and the interstate features of the business,—no "flow."

Stafford v. *Wallace*, 258 U. S. 495, involved a "stream of commerce"—the livestock with which the commission men and dealers had to do went into the stockyards as livestock and came out as livestock; what it was to be made into had nothing to do with any question before the court. Again, in the *Olsen* case, (*Chicago Board of Trade* v. *Olsen*, 262 U. S. 1) the statute dealt with a commodity, grain, in course of interstate commerce, by the very acts of the parties through bills of lading.

Intention to find a market for the trailers in other States does not make their manufacture a part of commerce. *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. The reasoning of these cases can not be put aside here because they were tax cases.

"The conclusion of the Board is this, that, while the manufacturing itself may be something local in character, nevertheless, if a labor dispute were to arise and if the operations of these factories were to shut down as a result of the dispute, raw materials would not be shipped in, finished products would not be shipped out; thereby there would be a burden and obstruction on the free flow of commerce; and that unrest caused among the production

employees therefore would have the effect of burdening and obstructing commerce, because those acts of unrest might lead to a labor dispute.

"Now, that is a very, very tenuous series of arguments. It does not hold together. In fact, it seems to me that *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 467; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, and *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, dispose of that sort of argument. . . .

"As to what must be the relation to bring it within the term 'affecting commerce,' counsel on the other side make much of the use of the word 'necessary,' but they omit in most of their talk the use of the word 'direct.' This Court always couples the two together. Probably the best statement that this Court has made is in the *Coronado* case, 259 U. S. 411, where it said: '. . . intended to restrain commerce . . . or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred.'

"Now, I take it that any act has a number of incidental effects as well as direct effects. The three building cases, of which *Industrial Association* v. *United States*, 268 U. S. 64, is one, well exemplify this. In each of them the effect of the course of action complained of upon interstate commerce was to curtail the use of materials which to that time had been coming into the State and had been used in building. In the first and third cases this was an incidental result, albeit a necessary result, of the course of action complained of, while in the second case it was a direct result, the course of action complained of being directed solely and exclusively at materials which had been shipped in interstate commerce.

"They also discuss the question of 'intent' and 'necessary effect,' and say that those are two bases of what they call the 'control power,' and then they leave them away

behind and proceed to push out the federal power to include any situation which presents 'a reasonable likelihood that a strike, if it occurred, would involve an intent to affect commerce, etc.'

"A strike may not have that intention but it might develop, and then the Board is to determine 'the probability of the occurrence of an evil which Congress could control'—whether the situation is comparable to and of the same general type as those situations 'from which in the past there had evolved strikes with intent to affect commerce, or where such intention might reasonably be expected to develop.' And then they push out in still another direction and they say that the basis of their power is found 'in recurring evils which in their totality constitute a burden on interstate commerce' though such evils arise from activities 'usually of only local concern.' And this may extend to any situation 'where the reduction in the supply of the commodity is so large that an intent to burden and obstruct interstate commerce may be inferred.' That argument is too tenuous to follow. . . ."

[The remainder of the argument was occupied mainly with the question of due process.]

National Labor Board v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58

Mr. Charles Fahy, General Counsel, National Labor Relations Board, after stating the case:

"Without going again into the arguments as to the position of the Government on the application of this Act to such an enterprise, I will simply add that it is apparent from the nature of this business, which I have briefly described . . ., that the respondent, as a regular course of its business, is utterly and completely depend-

ent upon interstate commerce, and it would seem that if a strike occurred at Richmond in the plant there . . . would be a complete cessation of its interstate commerce.

"A strike ordinarily closes an entire plant. Orders could not be filled. . . . Strike clauses are inserted in many contracts of those supplying products, to take care of just such a situation. . . .

"The respondent employs 800 employees. Therefore, although not as large, of course, as the Jones & Laughlin Steel Corporation or the Fruehauf Company, it is a large manufacturer. It has grown up in Virginia, the site of its manufacturing operations, with a national market, because of the control of the Federal Government over interstate commerce, which allows the respondent, while located in Virginia, to receive without impediment its raw materials from outside the State, and to sell to a national market 82 per cent. of his products."

MR. LEONARD WEINBERG, for the Clothing Company, after restating the case:

"The business of this company comprehends perhaps less than one per cent. of the clothing manufactured in the United States. This company does not differ in any respect from the hundreds of thousands of manufacturers in the United States producing apparel, and furniture and machinery, and utensils, and all the myriad articles which all of us wear or use in our daily lives.

"The unfair labor practices which are charged consist in discharging 19 of 800 employees, all of whom are engaged in the manufacture of clothing in this plant, all of whom are engaged in a conversion and fabrication which requires some 100 operations, or thereabouts, from the time the materials arrive in our plant until they leave as a finished product. . . .

"If on the Government's theory of the current and stream of commerce . . . this Act is applicable to us,

then I respectfully submit to Your Honors that the same considerations apply not only to every wholesaler, but with more force, it seems to me, to retailers. . . . If in our case, where we take utterly unrelated raw materials and convert and fabricate them, taking them out of the stream when they get to our factory, changing their character and transforming them into a suit of clothes, they can be said to be in the stream or current of commerce, because those clothes, forsooth, go out to purchasers beyond the State of Virginia—then how much more so can it be said of concerns which wholesale products coming from all over the United States, indeed from foreign countries, which do not transform those articles, and in many cases sell them in the original packages, and, indeed, in many instances never even take the merchandise into their own plants. [Referring to certain well known mail-order and other large mercantile establishments.]

"So that, if this argument of my friends with respect to the stream of commerce is applicable to a manufacturer who takes raw materials and converts them, it is equally applicable to everyone engaged in almost any business. . . . Now, if Your Honors please, I think the absurdity of the thing demonstrates its impracticability, without any further laboring with the law on the subject.

[Counsel discussed and countered the Board's findings of "unfair labor practices" in this case; denied that there had been any "industrial strife" or interruptions of business, and assailed the administrative conduct of the Board as arbitrary and unreasonable, especially with regard to the manner of obtaining evidence from the respondent and the irrelevancy of the evidence introduced and relied on by the Board.]

". . . We think that this decision that we cannot discharge men is tantamount to depriving the employer,

under the construction of this Act, as placed upon it by this Board in this and other cases, of all control in its management of its labor relations and of its internal business, in the promotion and the disciplining and the demoting of its employees, and substitutes the management of this National Labor Relations Board for the management of this company. It would be a work of supererogation to discuss at this hour the law respecting the power of Congress under the commerce clause, when it has been settled for at least 85 years by the decisions of this Court from *Gibbons* v. *Ogden,* 9 Wheat. 1, and *Kidd* v. *Pearson,* 128 U. S. 1, down to the *Carter* case in the last few months.

"Nor will I argue the arbitrary and unreasonable character of the order of reinstatement, although I do say that it attacks the very fundamentals of the relationship between employer and employee; and while it does not require, and cannot require, the employee to return to work, it requires the employer unwillingly to put the man back to work; and while the order does not say how long, certainly, I respectfully submit, it would be an empty gesture—an empty gesture—if it meant that all we had to do was to take him back that day and then find an excuse to discharge him the next day. . . . For the first time in the history of the English and the American law, specific performance is now set up for personal service contracts at will—the will of the Board.

[Counsel expressed objections to the provisions of the Board's order in respect of back pay and the posting of a notice, and to the action of the Board in bringing the case before the Circuit Court of Appeals for the Second Circuit rather than the court in whose jurisdiction the respondent's plant is located.]

"I say that these facts, as I have outlined them, demonstrate the abuses and the invasions of fundamental right that inevitably flow from this obnoxious Act and must always flow from legislation such as this. We sub-

mit that the *ex parte* facts in this case show conclusively that this respondent is not engaged in interstate commerce and that the unfair labor practices alleged cannot be said in law to directly affect interstate commerce."

MR. HARRY J. GREEN, on behalf of the Clothing Company.

"If this Act is valid, particularly as applied against a manufacturing concern local in its nature, and if the Federal Government has the right to regulate the relations and the individuals in the course of what must be admittedly a local business, then the right of the State to legislate on that subject in a form in anywise different is gone. . . .

"These very powers sought to be exercised by the Federal Government are powers denied by this Court to the State governments; and I need only refer Your Honors to two cases, *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, and 267 U. S. 552. In both of those cases the attempt was to require the employer to arbitrate his labor disputes. The attempt was made there, too, to require the employer to take back into his employ any persons whom he had discharged as a result of a labor dispute. So that the Federal Government is now claiming over a local enterprise powers which the local government itself does not have.

"In order to evade—evade—the implications there and the rulings, direct as they are, in the *Carter* and the *Schechter* cases, the Government contends now that this is not a regulation of wages and hours and conditions of employment and that the *Carter* and *Schechter* cases only related to them.

"On both of those propositions the Government, in the face of the decisions, must be in error; and there is no difference between requiring the employer and employee to bargain to a conclusion, as this Board has held, about

wages and hours and conditions of employment, and a direct regulation. The attempt here is to accomplish by indirection what has been forbidden when attempted by direct action. . . ."

MR. CHARLES E. WYZANSKI, Special Assistant to the Attorney General, on behalf of the Board, closed the argument.

". . . I turn now to what I began the argument with [in the Associated Press case, *ante* p. 734], the discussion whether or not this Act may be so applied as to cover all industry and labor throughout the country, and I wish in particular to develop the lines of possible distinction which were implicit in my opening argument but which I did not fully elaborate then.

"Of course, the Government contends that the Act may be applied to all the parties here at Bar, but if we are mistaken we wish to suggest possible lines of distinction between the different cases.

"The first two cases, those involving the Associated Press and the Washington, Virginia and Maryland Coach Company (301 U. S. 132), were cases in which the parties' principal activity was interstate commerce and the employees involved were either in or about commerce. We feel clearly that they are within the line of Congressional power, and I shall not pause to discuss the facts in those cases in any greater degree, but I turn to consider a comparison between the three manufacturing cases which are at bar, in order that, if Your Honors disagree with our position that all of them are within the scope of the Act, you may have a possible line for distinguishing between the cases.

"Your Honors will recall that this statute is a preventive statute designed to prevent those labor disputes which burden or obstruct commerce. There has been some talk at bar of the failure of Congress to include the

word 'directly' in the statute. Of course, Your Honors know that in the Sherman Act the word 'directly' is not included. In fact, with the exception of the ill-fated Bituminous Coal Conservation Act, I know of no Act of Congress relating to commerce which uses the word 'directly' in its jurisdictional ambit. The word 'directly' is necessarily implied by the decisions of this Court in interpreting all the statutes, and its omission here is, in our opinion, of no significance, provided that the Act be applied only to those disputes, or the causes of those disputes, which directly affect commerce.

"Now, there are several preliminary matters that I wish to state are not involved in this final discussion of the cases. At the outset I pointed out that the question whether freedom of organization and freedom of representation could be protected, whether that protection was reasonably related to commerce, was decided by Congress, and that that decision by Congress is a decision which does not have to be made again by the Board every time. The Board is entitled to assume that [discriminatory] practice will lead, or is likely to lead, to a dispute. The issue before the Board is whether or not a dispute, if it occurs, will be likely to burden or obstruct commerce; not whether the practice is likely to lead to the dispute. That issue is foreclosed under the terms of the statute, according to our reading of it. . . .

"A preventive statute, in order to be effective, must be addressed to those situations in which it is reasonably to be anticipated that a dispute within the power of Congress will occur. Until the practice has in fact spent its force nobody can tell what its consequences will be, but if there is a reasonable likelihood that the consequences will be a dispute that burdens commerce, then we say Congress has the power to prevent indulgence in that practice. . . .

"The mere fact that a cause has a local consequence as well as a national consequence does not prevent its being within the power of Congress, for obviously any cause is bound to have many different effects. The only question is whether it has a national effect within the power of Congress.

"Our position with respect to these manufacturing cases is perhaps stated most succinctly in the summary of our argument in Jones & Laughlin, where we have tried to state as briefly as possible the various theories upon which we suggest it is possible to apply this statute to one, two, or three of the manufacturing cases at bar.

"As I said, there is a distinct difference between the enterprises which are at bar. We have said that the power of Congress clearly includes the power to prevent a strike—rather to punish a strike—called with the intent of affecting commerce, and we have suggested that at least in some of these cases there is a very grave danger that the continuance of this discriminatory sort of practice will cause a strike of that type. . . .

"Jones & Laughlin is an integrated enterprise operating in many States, with approximately 20 different outlets, getting its raw materials from many different States. Although the principal manufacturing is done in Pittsburgh, the enterprise is farflung. If a dispute began in Jones & Laughlin, we know with reasonable certainty that it would be bound to involve, intentionally, interstate commerce; for persons at one particular focal point would undoubtedly choose to get as much support as they could from the persons working in other parts of the enterprise, including the persons working on the transportation and interstate activities of the company.

"Moreover, we know, for the record shows [Exhibit 44] that the steel companies of this country have united on a common labor policy, and though I do not intend to discuss the merit of that policy, I merely advert to it for

the point of showing that if a dispute occurs between the employees in this company and the company itself, it is reasonable to expect that the dispute will spread to other employees dealing with employers united on a common front with respect to their labor policy.

"We have said that the power of Congress relates not only to strikes with intent, but strikes where there is a necessary effect, of interrupting commerce. The scope of the 'necessary effect' principle is by no means certain, and on this we may make a number of alternative suggestions. We have merely pointed out, as something of which we feel certain, that intent is not necessary in order to show that a dispute is within the power of Congress, because, as Your Honors have said in the *Patten* case, 226 U. S. 525, if the necessary effect of a practice is to obstruct commerce it is unnecessary to charge a specific intent.

"Now, when does a labor dispute have a necessary effect upon commerce? We have suggested what one criterion may be, if the dispute involves a substantial amount of the commerce in a particular commodity.

"The Fruehauf Trailer Company [see *ante,* p. 766] presents a case very much in point. They are admittedly the largest of the companies in the trailer business. Their nearest competitor does only 37 per cent. as much as they do. If there is anything in the doctrine that we suggest, that the obstruction of a substantial amount of the commerce in a commodity works such a necessary effect upon commerce that Congress can control it, the principle would apply to the Fruehauf Trailer Company. It would also seem that it might apply to Jones & Laughlin, but I am not going to spell out all the possible implications. I am just covering in summary fashion the argument which has already been made. . . .

"We do not rest our whole case, even with respect to necessary effect, upon stream of commerce. Nor do we

say that necessarily every enterprise which receives and ships in interstate commerce is in a well defined stream of commerce. The exact scope of that doctrine may be broad or narrow. If it is broad, it would cover the case of the respondent clothing company, for that company admittedly receives 90 per cent. of its raw materials from outside of the State, and ships 80 per cent. of its products outside of the State, in which it manufactures.

"But it is not necessary to consider stream of commerce in any such broad way as we have urged. There is a narrower aspect of the doctrine which is open to this Court. It may be that a well-defined stream of commerce exists only in those cases where a single enterprise controls the sources of supplies, does the processing, and controls the outlets, so that the processing is a 'throat' with respect to that enterprise's flow of commerce. If such a concept be adopted it would clearly apply to the Jones & Laughlin case.

"There is another situation in which a necessary effect on commerce might possibly be spelled out, and that is where the effect of a dispute would be to interrupt a substantial volume of goods, although not a substantial proportion of the commerce in a commodity. If this is the doctrine, all the cases at bar would seem to be within it, for there is no case at bar in which the goods moving out of the enterprise amount to less than $1,750,000 a year, and in some cases they amount to much more than that. But I do not intend to describe in detail the facts with respect to all these things. I merely suggest possible lines of distinction.

"There is also a possibility which was developed by the Solicitor General in his argument in Jones & Laughlin; that is, that where a practice recurs frequently, as labor disputes recur frequently, it may be that Congress has the power to legislate with respect to those practices if they bear a relation to commerce.

"If that doctrine be accepted, it is admittedly the broadest of the doctrines with which I have dealt. We do not contend that it would apply to firms such as have been mentioned by the respondent, that is, retail firms who receive some of their products in interstate commerce or send out some of their goods in interstate commerce. We say it would apply only to those enterprises a substantial part of whose own business is either the receipt of goods in interstate commerce or the shipment of goods in interstate commerce. We do not claim that every one who receives or ships in interstate commerce would fall within the scope of the principle.

"I have one more specific word to say, and that is, as to whether a determination in this case with respect to the right of self-organization, freedom of representation, and freedom of association, forecloses any question with respect to wages, hours or substantive working conditions. Of course, as Your Honors are now well aware, the statute itself has nothing whatsoever to do with wages or hours; but the question may be raised, does the principle apply? It may or it may not, and we suggest that a distinction may be drawn, though we do not necessarily press it. This is the distinction which we suggest: It has been shown by the decisions in this Court that interference with freedom of association and freedom of representation bears a reasonable relation to commerce, because the protection of those rights avoids labor disputes. Now it may be that a fixing of minimum wages or of maximum hours would not in the same way avoid labor disputes, because the fixing of minimum wages and of maximum hours would not settle the field of controversy but would leave a large area of conflict; whereas this settles a large area of conflict and sets up a procedure for the voluntary amicable adjustment of the disputes. . . ."

STATEMENT SHOWING CASES ON DOCKET, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1934, 1935, AND 1936

	ORIGINAL			APPELLATE			TOTALS		
Terms	1934	1935	1936	1934	1935	1936	1934	1935	1936
Total cases on dockets	18	16	13	1,022	1,076	1,039	1,040	1,092	1,052
Cases disposed of during terms	5	4	1	926	986	941	931	990	942
Cases remaining on dockets	13	12	12	96	90	98	109	102	110

	TERMS		
	1934	1935	1936
Distribution of cases disposed of during terms:			
Original cases	5	4	1
Appellate cases on merits	256	269	270
Petitions for certiorari	670	717	671
Cases remaining on dockets:			
Original cases	13	12	12
Appellate cases on merits	51	56	53
Petitions for certiorari	45	34	45