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Jurisdiction of the National Labor Relations Board

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that greater justice would be accomplished by overturning the rule reasserted in the principal case.

W. T. PEGUES

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD*

Since its creation, the National Labor Relations Board has disposed of about a thousand cases. Of this vast number, the Supreme Court of the United States has passed on the Board's exercise of jurisdiction in seven.¹ About forty others have been reviewed by the various Circuit Courts of Appeals.

Although the decisions of the federal courts are of primary importance concerning the permissible area within which the Board may exercise its jurisdiction, nevertheless we may not overlook the attitude of the Board itself toward the scope of its powers.² The expressed intention of the Administrator of the Fair Labor Standards Act to be guided in the application of that act by rulings of the National Labor Relations Board³ gives added emphasis to jurisdictional findings by the Board.

All the cases which have been reviewed by the Supreme Court have been approved insofar as the exercise of jurisdiction by the Board is concerned. Of these, the *Jones and Laughlin Steel Corporation* case is first in importance. In approving the constitutionality of the National Labor Relations Act, the Court gave in broad outline the guiding theory applicable to the test of federal power to control:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial

* Established by the National Labor Relations Act, § 3, 49 Stat. 449, 451 (1935), 29 U.S.C.A. § 153 (Supp. 1938).

1. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937); Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 83 L.Ed. 131 (1938); Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938).

2. See Despres and Myer, The National Labor Relations Board—Decisions of its First Year (1936) 4 U. of Chi. L. Rev. 97.

3. 3 Labor Rel. Rep. 91 (1938).

relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The question is one *necessarily of degree*."⁴

The Supreme Court thus disposed of notions concerning the limitations of federal power over manufacturing and production activities that were prevalent under its expressions in earlier cases⁵ and threw the whole problem of national control into the uncertainty inherent in problems of "degree." Subsequent decisions⁶ by the Court have followed this theory without throwing much additional light on the proper manner of weighing the relationship encountered in any given case to determine whether it is "close and substantial."⁷

Nor have the decisions of the Circuit Courts of Appeals done much to clarify this situation. These courts have approved the exercise of jurisdiction in all but three cases presented.⁸ It seems that the criterion which has served as a guide in all the decisions is the *degree* of dependence of the particular business upon, and its connection with, interstate commerce.⁹ Of the three decisions

4. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937) (italics supplied). This rule was repeated in the Court's most recent opinion in the following words: "And whether or not particular action in the conduct of intrastate enterprises does affect that [interstate] commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise." Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 214, 83 L.Ed. 131 (1938).

5. United Mine Workers v. Coronado Co., 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922); United Leather Workers' v. Herkert and Meisel Trunk Co., 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104, 33 A.L.R. 566 (1924); Industrial Association v. United States, 268 U.S. 64, 45 S.Ct. 403, 69 L.Ed. 849 (1925); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 45 S.Ct. 551, 691 L.Ed. 963 (1925). See also Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

6. See cases cited in note 1, *supra*.

7. N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937), where the jurisdiction of the N.L.R.B. was sustained because 99.57 per cent of raw materials obtained outside state and 82.8 per cent of finished products shipped out. In the case of N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937), there was constant flow of raw materials and finished products across state lines to and from respondent, but the Court's refusal in the *Consolidated Edison* case to consider the source of the company's operating materials *may* indicate that no great support for jurisdiction would be found in such facts.

8. Foster Bros. Mfg. Co. v. N.L.R.B., 85 F. (2d) 984 (C.C.A. 4th, 1936); N.L.R.B. v. Fainblott, 98 F. (2d) 615 (C.C.A. 3rd, 1938); N.L.R.B. v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C.C.A. 9th, 1938).

9. N.L.R.B. v. Hopwood Retinning Co., Inc., 98 F. (2d) 97 (C.C.A. 2nd, 1938) (23 per cent of its business in interstate commerce). Standard Lime and Stone Co. v. N.L.R.B., 97 F. (2d) 531 (C.C.A. 4th, 1938) (83 per cent of product sold outside of state). N.L.R.B. v. Carlisle Lumber Co., 94 F. (2d) 138 (C.C.A. 9th, 1937) (all operations within the state but 90 per cent of product shipped outside).

disagreeing with the Board's exercise of jurisdiction, one¹⁰ obviously cannot stand in the light of decisions by the Supreme Court subsequently rendered, and the others¹¹ are at least of doubtful validity.

In the exercise of its granted power to make regulations in all labor disputes burdening and obstructing the free flow of interstate commerce, the Board has considered a great variety of cases. The factors which it has deemed important¹² in pursuing the course charted by decisions of the Supreme Court will appear from the following review of the Board's rulings.

Activities Directly in Interstate Commerce

Enterprises which are directly in interstate commerce have readily been found subject to the Act. These have included: the transportation of freight and passengers between countries;¹³ the activities of those acting as agents for others who admittedly do interstate business;¹⁴ the affairs of enterprises engaged in communication across state and foreign boundaries¹⁵ and in the widespread gathering and disseminating of information¹⁶ or news across state lines;¹⁷ the operation of a truck line, although no state lines are crossed,¹⁸ and even if operation is confined wholly within a single city;¹⁹ an intrastate unit of transportation serving in an interstate network,²⁰ or engaged in ferrying across a body of water within the state.²¹

10. *Foster Bros. Mfg. Co. v. N.L.R.B.*, 85 F. (2d) 984 (C.C.A. 4th, 1936).

11. *N.L.R.B. v. Fainblott*, 98 F. (2d) 615 (C.C.A. 3rd, 1938); *N.L.R.B. v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9th, 1938).

12. See *Mueller, Businesses Subject to the National Labor Relations Act* (1937) 35 Mich. L. Rev. 1286.

13. *In re France Lines*, 3 N.L.R.B. 64 (1937); *In re Cosmopolitan Shipping Co., Inc.*, 2 N.L.R.B. 759 (1937).

14. *In re Globe Service, Inc.*, 2 N.L.R.B. 610 (1937).

15. *In re Mackay Radio and Telegraph Co.*, 2 N.L.R.B. 500 (1936), jurisdiction affirmed, 87 F. (2d) 611 (C.C.A. 9th, 1937) (but petition of N.L.R.B. for enforcement of its order denied on other grounds).

16. *In re Consumers' Research, Inc.*, 2 N.L.R.B. 57 (1936).

17. *In re The Associated Press*, 1 N.L.R.B. 686 (1936), affirmed, 85 F. (2d) 56 (C.C.A. 2nd, 1936).

18. *In re Central Truck Lines, Inc.*, 3 N.L.R.B. 317, 326 (1937): "The respondent is engaged in the operation of a truck line which carries freight in interstate commerce. All its employees, although they may not be actually conducting the freight across state lines, perform some function necessary to that interstate transportation. Any interruption in the performance of that function would interfere with interstate commerce."

19. *In re Houston Cartage Co., Inc.*, 2 N.L.R.B. 1000 (1937).

20. *In re Santa Fe Trail Transportation Co.*, 2 N.L.R.B. 767 (1937).

21. *In re Delaware-New Jersey Ferry Co.*, 1 N.L.R.B. 85 (1935), 90 F. (2d) 520 (C.C.A. 3rd, 1937) (petition to enforce order of N.L.R.B. denied on other than jurisdictional grounds). The respondent objected to the jurisdiction of the Board contending that since the slips to and from which it proceeded

Businesses Constituting an Integral Part of Interstate Commerce

Likewise, businesses producing or working upon the instrumentalities of interstate commerce have been held within the jurisdiction of the Board. Even though the particular concern is not directly engaged in interstate commerce, if a cessation of its operations would directly interfere with the movement of commerce, then under the decisions of the Board it is subject to the Act.

In the first case²² decided by the Board, it was held that a labor dispute in an interstate bus-servicing garage would interfere with interstate transportation, thus causing a burden upon commerce which the Act was designed to prevent.²³ This view has been reaffirmed in subsequent similar cases.²⁴ The theory that the business is an integral and necessary part of interstate commerce has also been applied to concerns engaged in the following activities: furnishing tugboat assistance to ocean-going vessels;²⁵ conducting interstate warehouse services;²⁶ in the manufacture and installation of motors for, and the use of an experimental field by, commercial airships;²⁷ the repair of fishing vessels which go outside the three mile limit;²⁸ the supplying of longshoremens for the purpose of unloading and reloading coal on interstate carriers;²⁹ the furnishing of watchmen and guards to various shipping companies for the purpose of guarding freight received from interstate vessels;³⁰ the repairing of private automobiles;³¹ and the operation of stockyards facilitating the shipment of meats.³²

Even though a company is not itself directly engaged in in-

were entirely in Delaware waters, it was therefore not engaged in such commerce. In support of its view the respondent cited *The Daniel Ball*, 77 U.S. 557, 19 L.Ed. 999 (1871).

22. In re Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935), order of N.L.R.B. modified on other than jurisdictional grounds, 91 F. (2d) 178 (C.C.A. 3rd, 1937).

23. National Labor Relations Act, § 2 (8, 6), 49 Stat. 449, 450 (1935); 29 U.S.C.A. § 152 (Supp. 1935).

24. In re New England Transportation Co., 1 N.L.R.B. 130 (1936); In re Washington, Virginia & Maryland Coach Co., 1 N.L.R.B. 769 (1936), order enforced, 85 F. (2d) 990 (C.C.A. 4th, 1936), affirmed, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937).

25. In re Gawanas Towing Co., Inc., Case R-634 (Aug. 5, 1938).

26. In re Santa Cruz Fruit Packing Co., 1 N.L.R.B. 454 (1936), order modified so as not to affect workers at plant not making interstate shipments, 91 F. (2d) 790 (C.C.A. 9th, 1937).

27. In re United Aircraft Mfg. Corp., 1 N.L.R.B. 236 (1936).

28. In re Harbor Boat Bldg. Co., 1 N.L.R.B. 349 (1936).

29. In re Frederick R. Barrett, 3 N.L.R.B. 513 (1937).

30. In re Williams Dimond and Co., 2 N.L.R.B. 859 (1937).

31. In re Nolan Motor Co., Inc., 2 N.L.R.B. 357 (1936).

32. In re St. Joseph Stock Yards Co., 2 N.L.R.B. 39 (1936).

terstate commerce or working upon the instrumentalities thereof, if other businesses or activities that are directly or indirectly engaged in interstate commerce, such as telegraph and railroad systems or the furnishing of navigation lights, are dependent upon its service, the Board has jurisdiction. Thus the Board has held that any labor dispute which may tend to disrupt this service comes within its jurisdiction because of the possible burdening effect upon the smooth flow of commerce.³³ Likewise, businesses making use of power generated outside the state have been held to be under the jurisdiction of the Board.³⁴ The Board's exercise of jurisdiction in such cases was approved in general by the Supreme Court in one of its most recent decisions.³⁵

Businesses Producing for Interstate Commerce

In keeping with decisions of the Supreme Court, manufacturing establishments which produce goods for shipment in interstate commerce come under the jurisdiction of the National Labor Relations Board.³⁶ Although the business may do most of its purchasing and selling within the state, if it ships on interstate carriers,³⁷ or uses any route which goes outside the boundaries of the state,³⁸ it may be held subject to the Act. The cases indicate that even though the initial movement of the goods is not in interstate commerce, jurisdiction would exist if, for example, the purchaser is a mail-order house,³⁹ a chain-store,⁴⁰ or jobber,⁴¹ or if in the natural course of the purchaser's business the product will enter interstate commerce.⁴²

As these cases indicate, the National Labor Relations Board will take the subsequent disposal of the goods into consideration in determining its jurisdiction over the original seller. But these

33. *In re Pacific Gas and Electric Co.*, 3 N.L.R.B. 835 (1937); *In re Consolidated Edison Co. of New York, Inc.*, 4 N.L.R.B. 71 (1937), jurisdiction approved but order modified on other grounds, 59 S.Ct. 206, 83 L.Ed. 131 (1938).

34. *In re Tupelo Garment Co.*, 7 N.L.R.B. No. 52 (1938).

35. *Consolidated Edison Co. v. N.L.R.B.*, 59 S.Ct. 206, 83 L.Ed. 131 (1938).

36. *In re Canton Enameling and Stamping Co.*, 1 N.L.R.B. 402 (1936); *In re Belmont Stamping and Enameling Co.*, 1 N.L.R.B. 378 (1936); *In re Brown Shoe Co., Inc.*, 1 N.L.R.B. 803 (1936); *In re Wheeling Steel Corp.*, 1 N.L.R.B. 699 (1936).

37. *In re The Ontario Knife Co.*, 4 N.L.R.B. 29 (1937).

38. *In re Shipowners' Association of Pacific Coast*, 7 N.L.R.B. No. 120 (1938); see also *In re D. and H. Motor Freight Co.*, 2 N.L.R.B. 231 (1936).

39. *In re Hardwick Stove Co. Inc.*, 2 N.L.R.B. 78 (1936).

40. *In re Somerset Shoe Co.*, 5 N.L.R.B. 486 (1938).

41. *In re Somerset Shoe Co.*, 5 N.L.R.B. 486 (1938); *In re Empire Worsted Mills, Inc.*, 6 N.L.R.B. 513 (1938).

42. *In re Petroleum Iron Works Co.*, 4 N.L.R.B. 959 (1938).

decisions do not indicate whether the time element with respect to subsequent movements in interstate commerce would have any effect on its jurisdictional finding. In one case, however, the Board seems to have taken into consideration the universal use of the product (carbon black) and thus inferred that its production would ultimately have an effect on interstate commerce.⁴³ In keeping with the foregoing, the decisions show the futility of pleading that the title of the goods passed to the purchaser before they left the state⁴⁴ or that the respondent never at any time held title to the goods,⁴⁵ although a recent decision of the Circuit Court of Appeals supports a contrary view.⁴⁶

Businesses Dependent on Interstate Commerce for Supplies

Just as the use of the channels of interstate commerce in the marketing or distribution of the products in which an establishment is dealing may result in federal power to control its labor relations, so has the dependence of a business on interstate commerce for its sources been used as a basis for jurisdiction. Thus the direct dependence upon interstate commerce for raw materials⁴⁷ or machinery and operating equipment⁴⁸ has been considered as conferring jurisdiction on the Board. And even if the immediate source is local, the prior interstate movement of materials may subject the business to the Act.⁴⁹ In holding newspaper-publishing within the operation of the statute, the Board has relied on the receipt of national advertising revenue,⁵⁰ the use of syndicated material⁵¹ and newsprint, ink and wrapping material⁵² coming from outside the state, membership in the Asso-

43. In re United Carbon Co., Inc., 7 N.L.R.B. No. 78 (1938).

44. In re Botany Worsted Mills, 4 N.L.R.B. 292 (1937).

45. In re California Wool Scouring Co., 5 N.L.R.B. 782 (1938).

46. N.L.R.B. v. Fainblott, 98 F. (2d) 615 (C.C.A. 3rd, 1938); N.L.R.B. v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C.C.A. 9th, 1938).

47. In re Baer Co. Inc., 1 N.L.R.B. 159 (1936); In re Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936); In re Beaver Mills-Lois Mill, 1 N.L.R.B. 147 (1936); In re United States Stamping Co., 1 N.L.R.B. 123 (1936); In re Radiant Mills Co., 1 N.L.R.B. 274 (1936); In re Bendix Products Corp., 1 N.L.R.B. 173 (1936); In re Saxon Mills, 1 N.L.R.B. 153 (1936).

48. In re Standard Lime and Stone Co., 5 N.L.R.B. 106, 109 (1938); In re The Novelty Steam Boiler Works, 7 N.L.R.B. No. 116 (1938). In both these cases, machinery and equipment were purchased out of state.

49. In re Brown-Saltman Furniture Co., 7 N.L.R.B. No. 136 (1938): "A small amount of these materials are procured by the Company *directly* from sources outside the State; the remainder through *jobbers* whose sources of supply are located in other States and territories of the United States." (Italics supplied.)

50. In re Citizen-News Co., 8 N.L.R.B. No. 123 (1938).

51. In re The A. S. Abell Co., 5 N.L.R.B. 644 (1938), jurisdiction of Board approved, but order modified on other grounds, 97 F. (2d) 951 (C.C.A. 4th, 1938).

52. In re Edward E. Cox, Printer, Inc., 1 N.L.R.B. 594 (1936):

ciated Press,⁵³ and the purchase of operating equipment or replacement parts from out of state.⁵⁴

Facts Considered of Evidential Value

The Board's practice of attaching evidential value to a variety of facts in assuming jurisdiction is a further complication that increases the difficulty of discovering a standard by which the power to control may be determined. In supporting its assumption of jurisdiction, the Board has pointed to such facts as the registration of stock issues with the Securities and Exchange Commission,⁵⁵ the use of commission brokers,⁵⁶ or stationary sales representatives,⁵⁷ the employment of traveling salesmen,⁵⁸ the application for and use of trade marks,⁵⁹ the incidental interstate movement of raw materials and finished goods,⁶⁰ advertising in national publications⁶¹ and by means of the radio,⁶² the securing of a license to transact business as a foreign corporation,⁶³ the application for and receipt of the meat inspection service of the Department of Agriculture,⁶⁴ statements made in legal proceedings,⁶⁵ or statements in a prospectus issued in connection with a sale of bonds,⁶⁶ and finally, the extent of the market in which the business competes with manufacturers in other parts of the nation.⁶⁷ The last-mentioned fact suggests that the existence of competition between a local product and a product interstate in origin *may* justify the exercise of jurisdiction. Although the presence of factors of this kind may not alone be controlling, their significance cannot be overlooked.

53. In re The A. S. Abell Co., 5 N.L.R.B. 644 (1938), jurisdiction of Board approved, but order modified on other grounds, 97 F. (2d) 951 (C.C.A. 4th, 1938).

54. In re Citizen-News Co., 8 N.L.R.B. No. 123 (1938).

55. In re Fedders Mfg. Co., 3 N.L.R.B. 818 (1937); In re Allis-Chalmers Mfg. Co., 4 N.L.R.B. 159 (1937).

56. In re Hubinger Co., 4 N.L.R.B. 428 (1937).

57. In re Rollway Bearing Co., 1 N.L.R.B. 651 (1936).

58. In re Atlas Mills, Inc., 3 N.L.R.B. 10 (1937).

59. In re International Nickel Co., Inc., 1 N.L.R.B. 907 (1936); In re John Blood and Co., Inc., 1 N.L.R.B. 371 (1936).

60. In re Mann Edge Tool Co., 1 N.L.R.B. 977 (1936); In re Columbian Enameling and Stamping Co., 1 N.L.R.B. 181 (1936).

61. In re National Casket Co., Inc., 1 N.L.R.B. 963 (1936); In re Chrysler Corp., 1 N.L.R.B. 164 (1936).

62. In re Horton Mfg. Co., 6 N.L.R.B. 2 (1938).

63. In re Highway Trailer Co., 3 N.L.R.B. 591 (1937).

64. In re John Minder and Son, Inc., 6 N.L.R.B. 764 (1938). This service is only supplied to firms engaged in interstate commerce (6 N.L.R.B. at 765).

65. In re Altorfer Brothers Co., 5 N.L.R.B. 713 (1938).

66. In re Whiterock Quarries, Inc., 5 N.L.R.B. 601 (1938).

67. In re Wallace Mfg. Co., Inc., 2 N.L.R.B. 1081 (1937), affirmed, 95 F. (2d) 818 (C.C.A. 4th, 1938).

CONCLUSION

As shown by the foregoing survey there may be power to control with respect to any process from initial production of the raw product to its final delivery to the consumer as a finished article, if movement in interstate commerce intervenes. If, anywhere along the line, labor strife would tend to affect the flow of a commodity through the interstate channels of trade and commerce, the power of the Board may be felt. But direct interference with a "flow" is not necessary. That is, the activity in question may affect interstate commerce although the "flow" has not yet begun or has already ended. Original production of a commodity to be moved in interstate commerce is intimately connected with such movement, and likewise, the subsequent working upon or handling thereof will have a direct connection.

A troublesome problem arises from the possibility of a break in the interstate movement which may result in the activities in question affecting commerce only *remotely* or *unsubstantially*. Although the production of goods for shipment in interstate commerce may confer jurisdiction, what if the things produced do not move *directly* in such commerce? The Circuit Court of Appeals for the Ninth Circuit reversed a Board order for lack of jurisdiction on a finding that the gold mined by the company was all sold within the state and that no substantial out of state purchases of material were made.⁶⁸ This reversal occurred notwithstanding the facts that the gold, after being commingled with other gold secured elsewhere by the purchaser, was subsequently shipped out of state, and also that about \$125,000 of operating materials used by the company were obtained from outside the state. The existence of such a break, of course, makes original production activities more "*remote*" or "*distant*" from the commerce that they may affect. Although no mathematical formula may be prescribed to determine when a given effect may be properly called "substantial,"⁶⁹ greater exactness seems possible on the question of "remoteness." Subsequent decisions can do much to point the way.

Various problems are suggested by the cases such as whether jurisdiction would exist if the labor trouble occurs in a seasonal business at a time when no production is in progress,⁷⁰ or when

68. *In re Idaho-Maryland Mines Corp.*, 4 N.L.R.B. 784 (1938); reversed, N.L.R.B. v. *Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9th, 1938).

69. *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938).

70. *In re North Whittier Heights Citrus Ass'n*, 6 N.L.R.B. No. 18 (1938).

no shipments are being made or received,⁷¹ or if sufficient goods to continue regular shipments despite the labor trouble are in storage,⁷² or if the business can still continue to operate just as efficiently without hindrance to the interstate movement of goods.⁷³ Obviously such questions lead back to the meaning of "close and substantial" and to the problem of "degree." Until the Supreme Court has spoken more definitely, no satisfying formula for their solution can be devised.

In one case⁷⁴ a business was found subject to the Act although the conduct of only one department thereof affected interstate commerce. There was a finding however that the personnel of the various departments was overlapping. Whether complete segregation would suffice to escape the operation of the Act has not been decided by the Board. The solution to this question would perhaps depend upon a factual showing that a labor dispute in a department not engaged in interstate commerce would or would not interfere with the functioning of the department affecting such commerce.

In all the cases decided by the Supreme Court where the issue of lack of jurisdiction was raised, the standard approach has been to examine the actual extent of dependence upon interstate commerce of the particular business. However, it has been suggested that the actual amount of the manufactured product which moves in interstate commerce is unimportant so long as some portion of it does. The position was that if even one per cent moved in interstate commerce the effect of labor troubles preventing or obstructing such movement would be direct and immediate, with resulting jurisdiction in the Board.⁷⁵ Perhaps the solution to this problem lies in the meaning of the word "degree" as employed by the Supreme Court in the *Jones and Laughlin* case.⁷⁶ If the ref-

71. In re Rex Mfg. Co., 7 N.L.R.B. No. 16 (1938).

72. In re Louis Hornick and Co., Inc., 2 N.L.R.B. 983 (1937); In re The Warfield Co., 6 N.L.R.B. 58 (1938).

73. In re Kentucky Firebrick Co., 3 N.L.R.B. 455 (1937), affirmed, 99 F. (2d) 89 (C.C.A. 6th, 1938); In re Sheba Ann Frocks, Inc., 5 N.L.R.B. 12 (1938).

74. In re Wald Transfer and Storage Co., Inc., 3 N.L.R.B. 712 (1937).

75. "... it is plain to see that interstate commerce is obstructed, because production of goods was halted by the unfair labor practice. I do not believe that it is important whether 98 per cent of respondent's production or only 1 per cent of it, actually moved in interstate commerce. So long as 1 per cent so moved, the unfair labor practice obstructed the movement to that extent. The effect would therefore be direct and immediate." Haney, J., in N.L.R.B. v. Santa Cruz Fruit Packing Co., 91 F. (2d) 790, 796 (C.C.A. 9th, 1937), noted in (1938) 12 Tulane L. Rev. 302.

76. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), cited supra note 4. See also the language of Haney, J., in note 75, supra.

erence here is to the directness or remoteness of the effect on interstate commerce, then the view just stated is perhaps correct. However, if this expression refers to the "extent" of the effect on such commerce, such a view cannot stand. Considered in connection with the expression "close and substantial" which immediately precedes the use of the word "degree" in the *Jones and Laughlin* opinion, the latter meaning is indicated. This position is further supported by the statements in the *Santa Cruz* case that "the provision cannot be applied by a mere reference to percentages" and "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a *close and substantial* relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."⁷⁷ In short, if one per cent of the output of a plant would have such an effect then jurisdiction would exist, if not, there would be an absence of power to control. The decisions of the Board seem to follow this view.

SIDNEY W. JACOBSON

TACIT RECONDUCTION—A NEW LEASE

A lease is said to be *tacitly reconducted*¹ when, upon the expiration of its term and without opposition by the lessor, the tenant remains in possession of the leased premises. The terms and conditions of the original agreement remain operative by reason of a legal presumption that this is the wish of the parties. To demonstrate that in Louisiana law² this tacit reconduction operates to create a *new* though implied agreement between the

77. *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 467, 58 S.Ct. 656, 661, 82 L.Ed. 954 (1938) (italics supplied).

1. Arts. 2688, 2689, La. Civil Code of 1870.

"*C'est la continuation de la jouissance d'une ferme ou d'une maison au prix et aux conditions que portait le bail qui est expiré, et qui n'a point été renouvelé.*" 13 Merlin, Répertoire de Jurisprudence (4 ed. 1815) 379, vo. Tacite Reconduction.

"It is the continuation of the enjoyment of a farm or of a house at the same price and conditions which attached to the lease which has expired, and which has not been [expressly] renewed." (Translation by author.)

2. For the language of Articles 2688 and 2689, La. Civil Code of 1870, see text, *infra* p. 444.