

lective-bargaining process.⁵¹ In addition, the NLRB has a broad power of investigation and the authority and ability to urge, through the regional director, informal settlements of grievances and to provide expeditious hearings.⁵² Furthermore, besides these administrative advantages, the Board, as a single agency, would be more effective than geographically scattered and ideologically diverse courts in establishing workable, consistent standards of fair representation.⁵³ Thus, it is evident that legislative history, national labor policy, statutory language, and jurisdictional desirability all support the holding of *Local 12* that the duty of fair representation implicit in section 9 is reflected by a correlative right in section 7, thereby making a breach of that duty an unfair labor practice under section 8(b)(1)(A).

JOHN J. REID

Labor Law—Railway Labor Act—Norris-LaGuardia Act—Injunction Against Secondary Labor Boycott.—*Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*¹—The Florida East Coast Railway (FEC), the Atlantic Coast Line Railroad (ACL), the Seaboard Air Line Railroad (SAL), and the Southern Railway each owned twenty-five per cent of the stock of the Jacksonville Terminal Company, a Florida corporation. Under contracts called "Operating and Guaranty Agreements," the Terminal Company provided certain services and facilities to the four stockholding railroads as well as to the Georgia Southern and Florida Railway.² In anticipation of a strike against it by the Brotherhood of Railroad Trainmen, FEC obtained an injunction against the Terminal Company and the other three stockholding railroads, requiring them to perform the terms of the "Operating and Guaranty Agreements."³

The Brotherhood struck FEC after the exhaustion of the statutory procedures for the peaceful settlement of disputes, at which point neither party had any recourse under the Railway Labor Act (RLA).⁴ The union

⁵¹ See Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 *Yale L.J.* 1327, 1358-59 (1958).

⁵² Blumrosen, *supra* note 27, at 1514.

⁵³ Cox, *The Duty of Fair Representation*, 2 *Vill. L. Rev.* 151, 173 (1957).

¹ 362 F.2d 649 (5th Cir.), *aff'd*, 385 U.S. 20 (1966).

² These services and facilities included, for example, freight interchange, track maintenance, switching and repair services, and "car service" as defined by the Interstate Commerce Act, 40 Stat. 101 (1917), as amended, 49 U.S.C. § 1(10) (1964). 362 F.2d at 650.

³ No opinion was published in that case.

Although the lower court's order specifically purported to bind the employees of both the defendant Terminal Company and the Railroad defendants, the court denied an application by the union representatives of said employees to intervene in an attempt to dissolve this injunction It was not appealed, since the brotherhoods were not permitted to intervene, and thus there was no aggrieved party.

Id. at 651.

⁴ 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964). For the history of this dispute between FEC and its employees, see *Florida E.C. Ry. v. United States*,

then began to picket the terminal with the express purpose of persuading the employees of both the Terminal Company and its stockholder railroads to perform no services for FEC and of thereby inducing these employers to agree to provide no services for FEC.⁵ The picketing was effective and caused "hundreds" of these employees to refuse to work.

Immediately, the Terminal Company, ACL, and SAL obtained an injunction in the federal district court to prohibit this picketing.⁶ On the union's appeal from this order, the court of appeals reversed. HELD: Under the Norris-LaGuardia Act,⁷ a federal court has no jurisdiction to enjoin a secondary labor boycott on the suit of a secondary employer engaged in the same industry as the primary employer. The court also held that Norris-LaGuardia forbids the injunction where, as here, there is an "economic self-interest" in the outcome of the primary dispute on the part of the secondary employers on the one hand and their employees on the other. The court rejected as irrelevant arguments that the secondary boycott was in violation of the policies of the RLA and the Interstate Commerce Act (ICA).⁸ The dissent argued that the injunction was not forbidden by Norris-LaGuardia, and that the policies of the RLA and the ICA required that it issue.

There are two separate issues in this case: (1) whether the Norris-LaGuardia Act by its terms forbids the injunction to issue; and (2) if it does, whether the policies of the RLA and the ICA require that the injunction issue notwithstanding Norris-LaGuardia. With regard to the first question, there would seem to be no doubt that literally Norris-LaGuardia prohibits the injunction, yet the strong dissent merits further investigation. Section 4 of the act provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case *involving or growing out of any labor dispute* to prohibit any *person*

348 F.2d 682 (5th Cir. 1965), aff'd sub nom. Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 384 U.S. 238 (1966), 8 B.C. Ind. & Com. L. Rev. 153 (1966); Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172 (5th Cir. 1964).

⁵ The specific purpose of the appellants' picketing in this case is highlighted by the testimony of Mr. Raymond C. Moore, Deputy President, Brotherhood of Railroad Trainmen, given at the Preliminary Injunction hearing, to the effect that if the Terminal Company "cease to provide services * * * for the FEC and cease to handle movement of FEC trains on its property," the pickets would be removed.

362 F.2d at 651.

⁶ There was no published opinion.

The District Court, without elaborating, held that the Norris-LaGuardia prohibition was "not applicable to the instant proceedings * * *" and enjoined the picketing, presumably upon the basis that it unlawfully interfered with legal obligations which the appellees owed the FEC by virtue of (a) the Operating and Guaranty Agreement; (b) the Interstate Commerce Act; and (c) the injunction previously [obtained by FEC]. . . .

Id. at 652.

⁷ 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

⁸ "[I]t should be emphasized that we here deal only with the enjoinability of appellants' activity and not with its legality for any other purpose." 362 F.2d at 653.

or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

....
(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or any other method not involving fraud or violence;

....
(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified. . . .⁹
(Emphasis added.)

Since the injunction granted by the district court clearly prohibited acts enumerated in subsections (a), (e), and (i) above, the terms of the statute limit the questions to two: (1) are defendants "persons participating or interested in" a labor dispute? and (2) does the instant case "involve or grow out of a labor dispute"? If either question is answered in the negative, then section 4 does not prohibit the injunction.

Section 13 of the act compels affirmative answers to both questions. Subsection (b), which defines "persons participating or interested" in a labor dispute, clearly includes the defendant union and its member employees:

A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.¹⁰

If there is any question of what the dispute is in which defendants are participating, the answer is supplied by subsection (c) of section 13, which provides that "the term 'labor dispute' includes any controversy concerning terms or conditions of employment. . . ."¹¹ This clearly includes the defendant Brotherhood's strike of FEC. Therefore, defendants are persons participating or interested in a labor dispute, and the applicability of Norris-LaGuardia depends upon the second question: whether the case involves or grows out of that labor dispute. Here the key definition is provided by section 13(a):

A case shall be held to involve or to grow out of a labor dispute when *the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are*

⁹ 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

¹⁰ 47 Stat. 73 (1932), 29 U.S.C. § 113(b) (1964).

¹¹ 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1964).

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members of the same or an affiliated organization of employers or employees; . . . or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).¹² (Emphasis added.)

It is clear that the instant case is within this definition. In fact, it is unnecessary to look beyond the fact that the litigants are engaged in the same industry in order to apply the definition.¹³ Once it has been found that the defendants are persons participating in a labor dispute, section 4 applies and the injunction is prohibited.

The dissent argued, however, that Norris-LaGuardia did not by its terms govern the instant case, but it is submitted that this argument is based upon a misstatement of the questions involved in determining whether section 4 applies. As previously noted, section 4 applies if the defendants are participants in a labor dispute as defined in subsections (b) and (c) of section 13, and if the case itself involves that labor dispute as defined in section 13(a). On this point, however, the dissent insisted upon reading section 4 as applying only if the case involved or grew out of a labor dispute as defined in section 13(c), ignoring the clearly applicable definition in section 13(a). Beginning with this misconstruction, it concluded that the question was: "whether this action is *between persons* involved in a labor dispute or; whether the subject matter of the litigation involves or grows out of a labor dispute in which appellants *and* appellees are participating or interested."¹⁴ (Emphasis added.) Not only is the dissent's framing of the issues unsupported by the words of Norris-LaGuardia, but there does not appear to be a single case in which such a requirement was imposed or even hinted at.¹⁵

A careful reading of the entire dissenting opinion reveals, however, that its analysis of the literal words of the Norris-LaGuardia Act is not seriously detrimental to its essential reasoning. As previously noted, the issue of whether Norris-LaGuardia literally applies is only the first issue in this case; the second issue is whether, assuming literal applicability, certain policy reasons require that it not govern the instant case. The dissent addresses itself primarily to the contention that literal application of the act "leads to the indefensible result that appellant-brotherhoods can picket and close

¹² 47 Stat. 73 (1932), 29 U.S.C. § 113(a) (1964).

¹³ To apply §§ 4 and 13, therefore, it was not necessary for the court to find that the secondary employers and their employees had an economic self-interest in the outcome of the FEC dispute.

¹⁴ 362 F.2d at 656. It is possible that the majority's discussion of the economic self-interest test was partly in response to the dissent's argument based upon the dissent's statement of the issue.

¹⁵ The dissent cited *United States v. United Mine Workers*, 330 U.S. 258 (1947), quoting from that opinion a statement which seems to support the contention that both parties to the case must be parties to the dispute. 362 F.2d at 658. The issue there, however, was whether the labor dispute, not the case, involved "persons." The Court concluded that it did not, because the government, against whom the union was striking, is not a "person." 330 U.S. at 275.

down any terminal anywhere in the nation through which an FEC car passes.¹⁶ Thus, it is essentially arguing the second issue and not the first. Examination, therefore, must now be made into the federal policies inherent in the RLA, the ICA, and Section 8(b)(4) of the Taft-Hartley Act.¹⁷

The RLA has been held to warrant an exception to Norris-LaGuardia in certain cases. The exception, broadly stated, is that when a particular provision of the RLA is unenforceable without the use of an injunction, the court may disregard the Norris-LaGuardia prohibition and issue an injunction calculated to enforce that provision.¹⁸ However, an examination of the cases so holding indicates that this exception to Norris-LaGuardia is not applicable in the instant litigation.

The first such case was *Virginian Ry. v. Systems Fed'n No. 40*.¹⁹ There the Court was faced with a railroad's interference with its employees' selection of a collective-bargaining representative, a direct violation of Section 2, Ninth of the RLA,²⁰ for which Congress had provided no remedy. The Court reasoned that Congress could not have intended to make the violation unremediable, and issued an injunction against the interference. This reasoning was buttressed with the rule of construction that the specific (RLA, Section 2, Ninth) governs the general (Norris-LaGuardia).²¹

The cases since *Virginian Ry.* have adhered closely to the rule that an injunction forbidden by Norris-LaGuardia will issue only if a mandatory and specific section of a federal statute, or a binding order of a federal agency, would be otherwise unenforceable.²² As an illustration of this rule, it is instructive to compare two 1957 Supreme Court decisions: *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*²³ and *Manion v. Kansas City Terminal Ry.*²⁴ The cases involved similar disputes, both of which were within the terms of Norris-LaGuardia. In both cases the injunction was sought against a striking union. In the *Chicago River* case, the dispute had been submitted to the National Railroad Adjustment Board, while in *Manion* it had not. In the former case, the Court reasoned that, because a specific provision of the RLA made a decision of the Board final and binding on both parties, an injunction against the strike must issue to preserve the Board's jurisdiction. In the latter case, however, since the dispute had not

¹⁶ 362 F.2d at 657.

¹⁷ 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964).

¹⁸ For a complete analysis of the conflict of the RLA with this and other sections of Norris-LaGuardia, see Note, 32 Tenn. L. Rev. 264 (1965); Note, 70 Yale L.J. 70, 76 (1960).

¹⁹ 300 U.S. 515 (1937).

²⁰ 48 Stat. 1186 (1934), as amended, 45 U.S.C. § 152(9) (1964). Note that Norris-LaGuardia forbids injunctions against employers as well as employees.

²¹ 300 U.S. at 563.

²² The cases of *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), and *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949), are not relevant here, because they involve a finding that Norris-LaGuardia does not forbid injunctions against deprivations of constitutional rights even though arising out of a labor dispute.

²³ 353 U.S. 30 (1957).

²⁴ 353 U.S. 927 (1957).

been submitted to the Board, the Court found no violation of any specific provision of the RLA and refused to enjoin the strike.²⁵

The limits of this exception have been closely observed by the courts, and no case can stand as authority for the proposition that action by RLA-employers or employees is enjoined, unless that action violates a *specific* provision of the RLA. There is no such violation in the present case. Recognizing this, the dissenting judge based his argument on a violation of the "policy" of the RLA and the ICA—presumably the policy against interruption of interstate commerce which pervades both statutes. Actually, the dissenting judge was advocating an extension of the exception to Norris-LaGuardia discussed above; he would find the exception compelled by the policies of the relevant statutes rather than by some specific provision only. The suggested extension, however, is completely without the justification which supported the previous cases. As has been shown, those cases were based on two familiar rules: (1) no right given by Congress will be vitiated for want of a remedy, or, perhaps, *ubi jus ibi remedium*; and (2) the rule of construction that the specific governs the general. To say that the policy against interruption of interstate commerce is a federally created right which in all cases demands a remedy is patently incorrect. Moreover, even if it could be said that, in this case, the policy is sufficiently weighty to override the Norris-LaGuardia Act, this requires that the second rule be reversed and that the general policy govern the more specific terms of Norris-LaGuardia. Therefore, an extension of the exception based merely upon the policies of the RLA and the ICA is unsupportable.

The dissent's arguments for extending the exception, however, are based not only on these policies, but also on the policy against the secondary labor boycott. That policy is strong and undeniable. Section 8(b)(4) of the Taft-Hartley Act²⁶ outlaws as an unfair labor practice virtually every secondary labor boycott. In fact, if the instant case were governed by Taft-Hartley instead of the RLA, section 8(b)(4) would allow the plaintiff-employers to seek a cease-and-desist order from the National Labor Relations Board.²⁷ The dilemma is clear. Taft-Hartley, which does not cover the instant case, clearly outlaws the secondary boycott; the RLA, which covers a field that includes the instant case, is silent. The dissent reasons from these circumstances that only inadvertence prevented Congress from

²⁵ The same rationale has been applied to binding orders of the ICC. See, e.g., *Baltimore & O.R.R. v. Chicago River & Ind. R.R.*, 170 F.2d 654 (7th Cir. 1948), cert. denied sub nom. *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 336 U.S. 944 (1949).

²⁶ 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964).

²⁷ Although the exemption is not as broad as it once was, the NLRB of necessity has no jurisdiction over disputes between RLA-employers and RLA-employees, since these fall within the jurisdiction of the National Railroad Adjustment Board and the National Mediation Board. For excellent coverage of the secondary-boycott problem and the 1959 amendments to Taft-Hartley, which give some protection to secondarily boycotted RLA-employers, see Farmer, *Secondary Boycotts—Loopholes Closed or Reopened?* 52 Geo. L.J. 392 (1964).

Neither the instant case nor this note deals with the question of whether the union's action would in fact be a violation of § 8(b)(4). See note 8 supra.

outlawing the secondary boycott in the RLA case. As in most questions of legislative intent, arguments on both sides are persuasive, and it is possible to conclude that the dissent is correct in its assessment of Congress' opinion of the secondary labor boycott.²⁸ It is not this step, but the next step in the dissent's reasoning which is fallacious: that if Congress intended to outlaw the secondary labor boycott, the injunction must issue. The fallacy lies in the easy assumption that the injunction is the proper remedy. There is, in fact, ample evidence for the opposite conclusion, for even those statutes which offer preventive protection against secondary boycotts do so not by means of judicial injunctions, but by orders made by agencies expert in the field of labor relations.

It is such an easily performed logical leap from the premise that something ought to be done about the secondary labor boycott to the conclusion that what ought to be done is the issuance of an injunction, that one might forget that there is an equally strong policy prohibiting that conclusion—the anti-injunction policy of Norris-LaGuardia.²⁹ Moreover, to permit an injunction to issue on the combined strengths of the policies of section 8(b)(4), the RLA, and the ICA would require a total reversal of what has been a congressional policy for over thirty years—namely, that federal labor policy is not determined by the courts, but by administrative boards set up by Congress.³⁰

In short, Congress has set down a rule in the form of a statute, which includes not only a policy against an injunction such as was sought in the instant case, but also a policy against having courts make the sort of decision which the issuance of an injunction here requires. A decision in favor of issuing the injunction would disregard the limitations which have been placed on the judiciary with regard to labor disputes. The proper forum for the remedy of the secondary-boycott gap in the RLA, or the RLA-gap in Section 8(b)(4) of Taft-Hartley, whichever it may be, is Congress rather than the courts. That is the policy dictated by Congress in Norris-LaGuardia.

JOHN R. SHAUGHNESSY, JR.

²⁸ The dissent bases its arguments primarily on a few statements made on the floor of the House and Senate during the debates on the Norris-LaGuardia Act. However, a thorough reading of the entire record of these debates leaves one with the impression that Congress had no intent to exempt secondary boycotts from its coverage. See 75 Cong. Rec. 4502-11, 4996-5019 (1932) (debates in Senate); 75 Cong. Rec. 5462-515 (1932) (debates in House).

²⁹ The reason and strength of that policy are well outlined in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

³⁰ See *id.* at 209, 210; 47 Stat. 70 (1932), 29 U.S.C. § 102 (1964).