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Congressional Legislation Affecting Railroad Employees

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CONGRESSIONAL LEGISLATION AFFECTING RAILROAD EMPLOYEES

A.

Legislation for Railway Employees Under the Commerce Clause

The power of Congress to regulate interestate commerce and incidentally, the relationship between railroads and their employees, is derived from Article 1, Section 8, Paragraph 3, of the Constitution of the United States, which reads as follows:

"The Congress shall have the power . . . to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

A construction of the specifically delegated power to Congress to so regulate commerce among the states, by the Supreme Court of the United States, has definitely established the principle that this grant of power to Congress is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. A natural sequence of the above principle is that any legislation of a state enacted in pursuance of any of its reserved power, which conflicts with the actual exercise of the power of Congress over the subject of Commerce, must give way before the supremacy of the natural authority, for necessarily "that which is not supreme must yield to that which is." [1]

It has been established by constitutional authority that transportation of property between the states is interstate commerce and comes under the control of federal, rather than state jurisdiction, although it has been said that interstate commerce in its practical conduct has many inci-

1 Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1 (1912)(Second Employers' Liability Cases).

dents having varying degrees of connection with it and effect upon it over which the state may have some power. This power of the state, which is gradually being absorbed by the federal authority, has been divided into the following classes: (1) Those in which the power of the state is exclusive; (2) Those in which the state may act in the absence of legislation by Congress; (3) Those in which the action and power of Congress is exclusive and thereby eliminating any power, real or imaginary, of state jurisdiction. These divisions, of course, are the extreme boundaries. The basis of the legislation and the facts supporting legislative action, especially that of state legislatures, is, to a considerable extent, predominantly controlling where there appears a conflict between federal and state jurisdiction in the absence of Congressional action on the legislative subject. Such legislation on the part of the state has been declared valid where Congress has been silent on the subject.[2] An example frequently cited was the enactment of laws by several states regulating the liability of railroads engaged in interstate commerce for injuries received by their employees while engaged in such commerce. The validity of such legislation, however, was sustained by the Supreme Court of the United States, because Congress, although empowered to regulate that subject, had not acted thereon, and, also, because the subject was one which fell within the police power of the states in the absence of action by Con-

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[2] Missouri P. R. Co. v. Norwood, 283 U. S. 249 (1931). The Court sustained the Arkansas full crew law, on the ground that a purpose to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in freight train and switching crews, will not be attributed to Congress if not clearly expressed.

The mandate on affirmance was subsequently amended to read: "Affirmed with costs without prejudice to any application to the District Court to amend the pleadings or otherwise." Upon filing an amended bill and answer, the cause was referred to a Master. A decision of a specially constituted District Court of the United States for Arkansas on April 7, 1933, handed down an opinion supported by finding of facts and conclusions of law that the complainant had not produced sufficient evidence in attacking the constitutionality of the state law and accordingly dismissed the bill, as amended, with costs.

gress.[3] This does not mean that Congressional inaction in no wise affects its power over the subject. As soon as Congress acts, the laws of the states affecting the same subject and operating in the same field, are superseded.[4] Under the application of this rule, affirmed in *Mondou v. New York, N. H. & H. R. Co.*[5] *(Second Employer's Liability Cases)*, and repeatedly reaffirmed in analagous cases,[6] the more humane state legislation enacted in behalf of its citizens who were employees of interstate carriers was declared inoperative for what appeared to be a more practical solution to an increasing problem. It is on the application of this same doctrine that the various state workmen's compensation acts are held to be inoperative and to exclude railroad employees where their injuries have been sustained while they have been engaged within the regulatory provisions of the Federal Employer's Liability Act, or where the carrier at the time of the injury was guilty of violating one of the Safety Appliance Acts, or any of the amendments thereto.

The present discussion deals solely with Federal Legislation which appears to be gradually wearing down the discrimination and legislative separation between employees engaged in interstate and intrastate commerce. An impartial investigation of legislation concerning railroads and their employees in recent years afford a basis of sufficient legislative precedent repeatedly upheld by the Supreme Court of the United States, with one exception (the First

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3 Chicago I. L. R. Co. v. Hackett, 228 U. S. 559 (1913), upheld an Indiana statute under which relief was sought prior to the enactment of the Second Employers' Liability Act.

4 Northern P. R. Co. v. Washington, 222 U. S. 370 (1912). Held, that the Hours of Service Act, precluded the state from making or enforcing a local regulation affecting hours of labor of railway employees even though the Federal Act did not become effective until "one year after its passage." During that year all state legislation was thus held to be inoperative and of no effect.

5 *Op. cit. supra* note 1.

6 Employers' Liability cases: Erie Co. v. Winfield, 244 U. S. 170 (1917); St. Louis I. M. & S. R. Co. v. Hesterly, 228 U. S. 702 (1913); New York C. R. Co. v. Winfield, 244 U. S. 147 (1917); Pryor v. Williams, 254 U. S. 43 (1920).

Federal Employer's Liability Act, 1906)[7] to warrant Federal legislation in behalf of that great body of men whose activities are performed in support of an uninterrupted flow of interstate commerce. Recognition by the Supreme Court of the United States of this fact was never more clearly expressed than when construing the provisions of the Safety Appliance Acts and amendments thereto.

Safety Appliance Acts

The initiative in providing remedial legislation in behalf of their citizens who were employees of railroads operating within and across their boundaries was left to the several states which created railroad commissions for the effective regulation of both forms of commerce. Such legislation was enacted by several western states prior to the enactment of the Interstate Commerce Act. With the increase in traffic necessarily causing an increase in the loss of life and limb on railroads operating under safeguards provided by state legislatures meeting infrequently, the legislation soon proved ineffective. Conceding their inability to cope with increased dangers the various state railroad commissioners, at their first joint convention of 1889, adopted a resolution urging Federal action. An investigation conducted by the Interstate Commerce Commission warranted a report to Congress in the same year disclosing the nature of accidents to which employees were subjected primarily because of an inadequate system of operating trains and cars with a great variety of couplers, automatic or otherwise.

Approximately four years later (March 2, 1893) Congress enacted an Act, entitled:

"An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Con-

[7] Howard v. Illinois C. R. Co., 247 U. S. 463 (1908).

tinuous Brakes and Their Locomotives with Driving-Wheel Brakes, and for Other Purposes." [8]

Section 1 of the Act declared it to be unlawful "for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake. . . ."

Section 2 declared it unlawful for any common carrier similarly engaged to use or permit to be hauled any car not equipped with automatic couplers dispensing with the risk of men going between the ends of the cars.

The remaining sections, 3 to 7 inclusive of the original act, applied to common carriers engaged according to the provisions of the preceding sections .

An amendment [9] to the Act, Section 8, was enacted in 1903, extending the provisions and requirements of the Act to common carriers by railroad in the territories and the District of Columbia, and were made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type" and that the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw bars, were made to apply to "all trains, locomotives, tenders, cars and similar vehicles, used in any railroad engaged in interstate commerce." At the same time Sections 9 and 10 were added.

Several additional amendments,[10] Section 11 to 16 inclusive, were enacted April 14, 1910, by Congress and sustained by the Supreme Court of the United States.[11] Here for the first time was created a precedent which was to guide Congress in the future in enacting legislation of still more

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8 27 Stat. 531, C. 196, April 1, 1896, 29 Stat. 85, C. 87, U. S. C., title 45, §§ 1-7.

9 32 Stat. 943, C. 976, U. S. C., title 45, §§ 8-10.

10 36 Stat. 298, C. 160, U. S. C., title 45, §§ 11-16.

11 Illinois Cent. R. Co. v. Williams, 242 U. S. 462 (1917).

benefit to railroad employees regardless of their employment capacity. The most recent legislation of this type is the Railway Labor Act [12] of May 20, 1926, discussed hereinafter.

The constitutionality of the Safety Appliance Act had been sustained by two lower Federal Courts prior to its consideration on constitutional grounds by the Supreme Court of the United States in *Wabash R. Co. v. United States*[13] and *United States v. International & G. N. R. Co.*[14] It was definitely held in 1911, in *Southern R. Co. v. United States,*[15] that Congress had the power, not only under the commerce clause of the Constitution, but because its power to regulate commerce is *plenary,* and competently may be exercised, as is conferred upon the states under their police powers, to secure the safety of the persons and property transported therein and of those who are employed in such transportation "no matter what may be the source of the dangers which threaten it." [16] To further quote from the opinion by Mr. Justice Van Devanter: "That is to say, it is *no objection* to such an exertion of this power that the dangers intended to be avoided arise, *in whole* or *in part,* out of matters connected with intrastate commerce." [17] The question whether the Acts were within the power of Congress to enact under the commerce clause, considering that they were not confined to vehicles engaged in interstate traffic, was stated by the court in another way: "Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the

12 44 Stat. 577, C. 347, U. S. C., title 45, §§ 151-163.
13 168 Fed. 1 (1909).
14 174 Fed. 638 (1909).
15 222 U. S. 20 (1911).
16 Southern R. Co. v. United States, 222 U. S. 20, 27 (1911).
17 *Op. cit. supra* note 16.

requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate?" [18] The answer was in the affirmative. But the announcement of the real benefit to be derived by the employees from this legislation was reserved until the concluding part of the opinion where the court said:

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others." [19]

On April 14, 1910, Congress added six amendatory sections to the original act, as amended.[20] The amendatory Act of 1910 grew out of the defective and continually increasing dangerous condition in which appliances, such as sill steps, ladders, running boards, and hand-brakes were frequently allowed to remain, although repeatedly called to the attention of the operating carriers; the utter failure to uniformly effect improved conditions and the fact that the original act precluded lawful movement of a car with defective equipment to a repair point.

The court, therefore, held that added strength to the original act was given by Section 8, and so enlarged the scope of the original act so as to embrace all cars used on

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18 Southern R. Co. v. United States, *op. cit. supra* note 15, at p. 26.
19 Southern R. Co. v. United States, *op. cit. supra* note 15, at p. 27.
20 See note 9, *supra*.

any railway operating as a highway of interstate commerce, whether the cars employed at the time were engaged in interstate or *intrastate* commerce. The effect of including, as a result of the amendatory act of 1903, *intrastate employees* was disclosed in an opinion several years later in *Texas & P. R. Co. v. Rigsby,*[21] where it was earnestly insisted that the plaintiff, Rigsby, a switchman, "was not under the protection of the Safety Appliance Acts because, at the time he was injured he was not engaged in interstate commerce." The employee's injury was directly attributable to the carrier's violation of one of the provisions of the amendments of 1910. In deciding that the employee, although not engaged in interstate commerce at the time of the injury was within the provisions of the Safety Appliance Acts, the court was not content to rest its decision upon the narrow ground, although supported by numerous decisions, that the doing of the employee's work, and his security while doing it, could not be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce. The reason for the court's unwillingness to so base its decision and to so stigmatize the law, was because, said the court, "we are convinced that there is *no constitutional obstacle* in the way of giving to the act in its remedial aspect as *broad* an application as was accorded to its penal provisions in *Southern R. Co. v. United States.*" [22] After discussing the paramount power of federal legislation over that enacted by the states, the court held that the consequences following a breach of the federal law "were vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other." [23]

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21 241 U. S. 33 (1915).
22 222 U. S. 20 (1911).
23 Texas & P. R. Co. v. Rigsby, *op. cit. supra* note 21, at p. 42.

Having reiterated the supreme power of Congress over state legislation on the same subject, and conceding that while the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, the fact nevertheless remained, according to the court, that the liability of carriers engaged in interstate commerce to pay compensation as provided because of the violation of established regulations for safeguarding interstate commerce was a matter "within the control of Congress." [24]

Seldom has the cry of discrimination been heard from the employees of railroads whose duties are confined more or less to intrastate commerce activities, in protest to enactment of legislation affecting their interests. This has been due in part, because it had previously been conceded, after the opinion in the *Second Employers' Liability Cases,* that only those employees engaged in interstate commerce, with certain exceptions, of which the Safety Appliance Acts provisions were one, were within the regulatory power of Congress. That such a protest would be justified is obvious from the concluding language of the above opinion, where the court said:

"Unless persons injured in *intrastate* commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce,—*a discrimination certainly not required by anything in the Constitution*—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, *with probable differences in the law* material to its effect as regulatory of the conduct of the carrier." [25]

By subsequent interpretations and constructions of the original Acts, and amendments thereto, the laws so written were by no means confined in their terms to the protection of employees engaged to go between cars to couple and un-

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24 *Op. cit. supra* note 23.

25 *Op. cit. supra* note 23. See also Illinois C. R. Co. v. Behrens, 233 U. S. 473, 477 (1914). The view of the court was expressed by Mr. Justice Van Devanter, who delivered the opinion in the Second Employers' Liability cases, *supra.*

couple them. They applied equally to those employees injured when not so engaged. The opinions of the Supreme Court make it clear that the liability of the carriers for damages to their employees for failure to comply with the terms of the Acts, as amended, springs from the declaration of it being unlawful to use cars equipped otherwise than as provided, and, as was held in *Louisville & N. R. Co. v. Layton*,[26] "not from the position the employee may be in, or the work which he may be doing at the moment when he is injured."

The Hours of Service Act

On March 4, 1907, at the instigation of the Interstate Commerce Commission,[27] and also upon recommendation of President Roosevelt,[28] Congress enacted an Act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," otherwise referred to as the Hours of Service Act.[29] This Act is applicable to all employees connected with the movement of trains in interstate transportation, including those who are, by virtue of practical necessity, also employed in intrastate transportation, but intrastate railroads and employees wholly engaged in local business are not affected by its provisions.

The Act, prior to the amendments enacted May 4, 1916, Sections 3 and 4, and Amendment to Section 2 of the original Act, received judicial approval in *Baltimore & O. R. Co. v. Interstate Com. Com.*[30] The carrier had unsuccessfully contended that the Act in its scope was the same as the First Federal Employers' Liability Act of 1906. This contention, however, was overruled by Mr. Justice Hughes in deciding

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26 243 U. S. 617, 621 (1916).

27 1904 Ann. Rep. 78, 79; 1905 Ann. Rep. 105.

28 Message of December 4, 1906.

29 34 Stat. 1415, C. 2939, § 3, U. S. C., title 45, § 63. Liability extends to officers and agents and is thus distinguished from the Safety Appliance Acts. See: Sherman v. United States, 282 U. S. 25 (1930).

30 221 U. S. 612 (1910).

that the Act was constitutional. This argument made by the carrier, Mr. Justice Hughes, said:

". . . undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation."

The Court's answer appears as follows:

"This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. . . . The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act."

The Court having declared that Congress can limit the hours of labor of employees of carriers engaged in interstate transportation, as provided in the act, it likewise gave support to the power by holding that it could not be defeated either by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations.

The Adamson Eight Hour Act

This Act [31] resulted from an imminent interruption of interstate commerce by a threatened general strike of railway employees. President Wilson pointed out that no resources at law were at his disposal for compulsory arbitration in order to compose the differences between the carriers and the employees and asked Congress to fix the eight hour standard of work and wages and for the creation of an official body to observe the operation of the legislation. Congress responded by enacting the law which was approved, first, on September 3, 1916, and, as that day was Sunday and the following Monday was Labor Day, again on September 5, 1916. The Act fixed eight hours as a day's work, and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the Act to Regulate Commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid pro rata at the same rate. The first Section of the Act provided that "Eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of *all employees* who are now or may hereafter be employed by *any* common carrier by railroad. . ." engaged in interstate commerce, and excepted certain roads not exceeding one hundred miles in length, electric street railroads, etc.

The Act was sustained by the Supreme Court in *Wilson v. New*,[32] in an opinion delivered by Mr. Chief Justice White. The question as to the power of Congress to so legislate even though intrastate employees may be affected was not raised as in the previous cases involving the constitutionality of the Safety Appliance Acts, the First Federal Employers' Liability Act, or the Hours of Service Act. It is apparent

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31 39 Stat. 721, C. 436.
32 243 U. S. 332 (1916).

that the carriers recognized from the language contained in the Act that it covered all employees of carriers subject to the Interstate Commerce Act. There existed up to this time clear-cut precedents for the action of Congress and for including those employees of interstate carriers whose duties were solely of intrastate operation, as to concede the point. The question invariably raised in the attacks made on other remedial legislation is therefore made conspicuous by its absence. In sustaining the Act, Mr. Chief Justice White, in the majority opinion, relied upon the former precedents sustaining similar legislation affecting regulation of carriers subject to the Interstate Commerce Act and their employees.

In the course of this opinion, he said:

"Certain is it that the power (to regulate) has been exercised so as to deal not only with the carrier, but with its servants, and to regulate the relation of such servants not only with their employers, but between themselves. [Reference is made to cases cited in a note.] Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act, and the Employers' Liability Act." [33]

We would be providing for a lame and impotent conclusion were we not to point out here that the cost of regulation ultimately incurred by the instruments so regulated is not a necessary factor to be considered by the court in an attack made on the laws involved. "Clear," said the Court, "also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty." [34]

The Boiler Inspection Act

The Ash Pan Act [35] of May 30, 1908, and Locomotive Inspection Act [36] of February 17, 1911, otherwise known as

33 Wilson v. New, *op. cit. supra* note 32, at pp. 349-50.
34 Wilson v. New, *op. cit. supra* note 32, at p. 350.
35 35 Stat. 476, C. 225.
36 36 Stat. 913, C. 103, 43 Stat. 659, C. 355 (1924).

the Boiler Inspection Act, were similarly sustained on the ground that they were within the congressional power to regulate commerce. These acts were enacted for the safety of the employees as verified in the opinions of *Great Northern R. Co. v. Donaldson* [37] and *Baltimore & O. R. Co. v. Groeger.*[38]

In 1915, the latter act was extended to cover the locomotive, its tender, and their appurtenances and created in the Interstate Commerce Commission the right and duty of inspection. The Act was otherwise made complete when in June, 1924, it was extended to all locomotives, electric as well as steam.

In *Napier v. Atlantic Coast Line R. Co.,*[39] the Boiler Inspection Act was "conceded to apply to a locomotive used on a highway of interstate commerce, even if it is operated wholly within one state and is not engaged in hauling interstate, freight or passengers."

The Federal Safety Appliance and Locomotive Inspection Acts having been declared to have been adopted for the health and safety of employees [40] whether engaged in interstate or intrastate commerce indicates, on the part of Congress, a desire to make more uniform the regulation between carriers and their employees with respect to liability for injuries and to compensate to some extent at least for the discrimination effected in the enactment of the Federal Employers' Liability Act of 1908, and its subsequent amendment in 1910.

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37 246 U. S. 121 (1917).

38 266 U. S. 521 (1924).

39 272 U. S. 605, 607 (1926).

40 Great Northern Ry. Co. v. Donaldson, *op. cit. supra* note 37; Balt. & O. R. Co. v. Groeger, *op. cit. supra* note 38.

B.

Legislation for Arbitration of Disputes Between Carriers and Their Employees

The Arbitration Act of 1888

This Act [41] provided for voluntary and compulsory investigation. It existed for ten years and during that time its provisions were not once called into use.

The Erdman Act of 1898

This Act [42] provided for meliation and arbitration. Until 1906, the Act was called into operation only once. However, from that date until the enactment of the Newlands Act, in 1913, it was frequently applied in railroad labor disputes.

The Newlands Act of 1913

This Act [43] was materially different from the previous acts in that it set up a permanent, full time Board of Arbitration and Conciliation. During the trial period which was short lived the Act proved successful, as far as the public was concerned, and then abruptly failed at a time when most needed. A nation-wide strike on the railroads of the country was averted by the timely Act of Congress, granting the employees' demands. The above Acts controlled the carriers and all employees of such carriers as were engaged in interstate commerce. Under the latter Act, the term employees included "all persons actually engaged in any capacity in train operation or train service of any description. . ." Here was the broadest and all inclusive provision ever enacted by Congress controlling carriers and their employees in any particular.

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41 25 Stat. 501, C. 1063.
42 30 Stat. 424, C. 370.
43 38 Stat. 103, C. 6.

THE TRANSPORTATION ACT OF 1920

The Railroad Labor Board

Shortly after the United States became involved in the War, the President took over the railroads of the country. The relations of the carriers and their employees was thereupon completely changed. Executive orders were issued providing for the settlement of disputes through bipartisan adjustment boards. The liberal display of patriotism on the part of the employees is shown by the fact that during the period of governmental operation no strikes occurred.

With the return of the railroads to private ownership, March 1, 1920, and the termination of Federal control, there immediately arose numerous differences in Congress as to methods of providing for the settlement of disputes between carriers and their employees. As a final result of the efforts of Congress, the Railroad Labor Board was created by the Transportation Act.[44] Nine members were provided for to be appointed by the President. The carriers and their employees were represented by three each, the remaining three members (neutral) were appointed to represent the public.

Vigorous opposition was made by the employees' *bona fide* organizations to the enactment of this legislation.

Unlike the Newlands Act, the Transportation Act did not include a definition of employees. It, however, imposed a duty on all carriers subject to the Act and their officers "employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof."

The unpopularity of the decisions of the Board continued to grow from the start and finally terminated in the strike of 1922. The Shop-Crafts refused to accept the board's de-

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44 Title III. of the Transportation Act of 1920; 41 Stat. 456, 469, C. 91.

cision over working rules. In September of the same year an injunction was issued in the United States District Court, at Chicago, causing the strike to end in failure.[45]

Although the Board, because of its injudicious decisions became discredited shortly after its creation, it became more so after the strike. The employees of railroads throughout the United States immediately began a campaign for the abolition of the Board and recommended the enactment of a new measure. The carriers, sensing the support of public opinion behind the employees' demands, changed their stubborn campaign of opposition, which was actively supported by the public representative office holders on the Board, and joined the employees in conferences to prepare the submission of a new measure to Congress. Out of these conferences resulted the Howell-Barkley Bill and finally the Watson-Parker Act, otherwise known as the Railway Labor Act.

THE RAILWAY LABOR ACT

This Act,[46] approved May 20, 1926, followed certain introductory provisions of the Newlands Act, most important

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45 United States v. Railroad E. Dept. A. F. of L., 283 Fed. 479 (1922), 290 Fed. 978 (1923).

46 44 Stat. 577, C. 347, U. S. C., title 45, §§ 151-163.

On March 3, 1933, Congress passed, and the President approved of An Act "To amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States.'" (H. R. 14359).

Under Sec. 77, on Reorganization of Railroads, sub-divs.:

(o) The right of railway employees under contract are preserved. No changes of wages or working conditions are permissible by a "judge or trustee" except in the manner prescribed in the Railway Labor Act.

(p) The right of an employee to join a labor organization of his choice shall not be denied; no company unions shall be maintained by any "judge or trustee" out of "funds of the railroad under his jurisdiction."

(q) Abolishes "yellow-dog contracts"; provides for blanket cancellation of contract if in existence at the time jurisdiction attaches though enforced prior thereto.

This provision gives further emphasis to the rights of employees of interstate carriers and it is hoped will discourage frequent cuts in pay and abolition of rules without notice to or conference with the duly authorized representatives of the employees. Much of the credit for sponsoring this amendment to the Bankruptcy Act is due to Senator George W. Norris, who introduced the amendment on the floor of the Senate. See Vol. 76, Cong. Rec., pp. 5260, 6265. (Feb. 27, 1933.)

of which was the definition of employees. The term "employees," as defined in Section 1, Fifth, of the Railway Labor Act, includes "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official, in the orders of the Interstate Commerce Commission, now in effect. . ."

It has long since been accepted by the carriers in general, and in no case, involving the Act or a construction of any of its provisions, has any question been raised as to the power of Congress to include employees whose work and labor is not anywhere near the character of that strictly required for employees under the Federal Employers' Liability Act. An example of the far-reaching and all inclusive provision of the section governing and defining employees is noted in the comparatively recent case of the *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks (Southern Pacific Clerks' Case)*.[47] The plaintiff Brotherhood was organized in September, 1918, and had been authorized by a majority of the railway clerks in the employ of the railroad company (apart from general office employees) to represent them in all matters relating to their clerical employment. The railroad company sought to intimidate members of the Brotherhood and to coerce them to withdraw from it and to sign up with the company union association. A temporary injunction was granted by the lower federal court and for failure to abide by its terms, proceedings for contempt were instituted against certain officers of the railroad company. Certain provisions were imposed on the defendants in order to purge themselves of the contempt and punishment was prescribed in case they failed to abide by the order of the court. On final hearing, the temporary

47 281 U. S. 548 (1930).

injunction was made permanent.[48] The decree was later affirmed by the Circuit Court of Appeals [49] and the Supreme Court of the United States.[50] The Act was held to be constitutional. From the language of the opinion it is safe to assume that had the question of the power of Congress to include all employees as defined in the Act within the terms of the Act, the Court would still have held that Congress under the power to regulate commerce rightly exercised its plenary power here to enact "all appropriate legislation" for its "protection and advancement," [51] and "to promote its growth and insure its safety." [52]

C.

PENDING LEGISLATION

Six-Hour Day

On July 14, 1932, a bill was introduced by Senator Wagner, S-4980, to establish the six-hour day as the standard work day on steam railroads. The succeeding day a companion bill was introduced in the House (H. R. 12991).[53]

Previously a resolution was introduced in Congress, directing the Interstate Commerce Commission to investigate what would be the effect upon operation, etc., of applying the six-hour day "in the employment of all classes and each particular class of railway employees because of such

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48 Brotherhood of Ry. and S. S. Clerks, etc., v. Texas & N. O. R. Co., 25 Fed. (2d) 873 (1928).

49 Texas & N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks, 33 Fed. (2d) 13 (1929).

50 Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548 (1930).

51 The Daniel Ball, 10 Wall. 557, 564 (1871).

52 County of Mobile v. Kimball, 102 U. S. 691, 696, 697 (1881).

53 Act of March 15, 1932, 47 Stat., C. 78.

The Interstate Commerce Commission presented its Report, Ex Parte 106, on December 6, 1932. Assuming that the present wage reduction is continued, the initial effect of enforcing the six-hour day would be an increase of approximately $630,000,000 per year in operating expenses while at the same time it would render necessary between 300,000 and 350,000 additional carrier employees in a year such as 1930, and between 60,000 and 100,000 additional employees in a year of abnormal economic conditions as presently exists. See note 33, *supra*.

application." Subsequently the Railway Labor Executives Association petitioned the Commission to order an extension of its investigation to include express companies and sleeping car companies. Such an order was finally entered by the Commission on May 19, 1932.

The provision of the Bills introduced made careful provision for the inclusion of all employees by adopting the same terms as were used in the Adamson Eight-Hour Law.

Retirement Insurance—Pension

Senator Robert F. Wagner, introduced on March 2, 1932, a bill (S. 3892) to provide for retirement insurance of railway employees.[54] The term employee includes every person in the service of a carrier who is included in the definition of "employee" in the Railway Labor Act.

Interstate Workmen's Compensation Act

On April 11, 1933, Senator Wagner, introduced a bill (S. 1320) to provide compensation for disability or death resulting from injury to employees in interstate commerce, and for other purposes. The purpose of the legislation is to extend the principle of workmen's compensation for industrial accidents to "the most important group of workers remaining without this modern protection,—interstate commerce employees." [55]

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54 A similar bill was introduced by Senator Hatfield (S. 4646). Hearings on these bills were concluded January 19, 1933. On March 27, 1933, Senator Hatfield introduced S. 817, to provide for a retirement system of railroad and transportation employees, to provide unemployment relief and for other purposes. Cong. Rec., Vol. 77, p. 843.

55 Cong. Rec., p. 14191. On June 23, 1932, a similar bill (S. 4927) was introduced by Senator Wagner. Cong. Rec., p. 14191. On February 25, 1933, an amended bill was introduced by Senator Wagner (S. 5695). Many improvements were contained in the latter bill over the provisions of the earlier. Relief, however, including the latest bill (S. 1320), is still restricted, and compensation under Section 3 of the Act is payable "only if the disability or death results from an injury occurring when the employee is employed in interstate or foreign commerce. . ."

The proposed Act provides that the United States Employees' Compensation Commission shall administer the provisions of the Act. The bill itself follows closely the well-tested Federal Longshoremen's Act of 1927.[56]

Provisions of the Act cover only those employees where the disability or death results from an injury occurring when the employee is employed in interstate or foreign commerce.

The above restriction is practically the same as is now imposed by the terms of the present Federal Employers' Liability Act.[57] While the proposed legislation has many admirable provisions there appears to this writer no just reason why all employees of interstate carriers, as in the provisions of the preceeding Acts should not be included. The loss occasioned is the same to the employer-carrier in the case of an accident to an employee whose duties are continually being changed from that of interstate to intrastate commerce. His position in order to avoid an interruption in whatever commerce he might have been engaged at the time of his injury must be refilled. With the additional increase of burdens cast upon a railway employee today, due to retrenchments and lay-offs, there exists scarcely an employee engaged in train operation who at some time or other during his daily routine is not engaged in assisting in an uninterrupted flow of interstate commerce. The discrimination in the proposed bill, as was said in the *Rigsby* case, is "certainly not required by anything in the Constitution." [58]

D.

Conclusion

It is devoutly to be hoped that all railway employees will participate in the "New Deal" and that legislation now pend-

56 44 Stat. 1424, C. 509, U. S. C., title 33, §§ 901-950.
57 Act of April 22, 1908, U. S. C., title 45, §§ 51-59.
58 *Op. cit. supra* note 21.

ing in Congress will protect to the full the interests of all employees of interstate carriers. With the pending plans submitted to the President and his advisers for railroad consolidation, the interests of the numerous employees cannot be overlooked. That Congress has the power to legislate for the protection of the interests of all employees of interstate carriers is not to be doubted in view of the strong language used in the opinion of the *Southern Pacific Clerks' Case.* Thus was opened up a new era for that great body of men who are still laboring under certain antedeluvian remedial acts, which the pending legislation gives every promise to repeal.

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