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INTRODUCTION

In view of the current move by the North Dakota State Legislature to appraise the labor laws of this state, a backward glance of Chapter 34-08 NDRC 1943 is in order. This chapter is a state enactment of Public Law 64 (Norris-LaGuardia Act). The reason for the act was "to amend the judicial code and to define and limit the jurisdiction of the courts sitting in equity and for other purposes." It was called anti-injunction legislation[1] at the time of passage.

The Norris-LaGuardia Act was approved on March 23, 1932. It was not rammed through the mill of Congress, nor was it ill-considered, indeed, it took 14 years of debate and committee reports before it was voted upon, and when it was voted upon, it passed almost as decisively as the Declaration of War after Pearl Harbor. The vote in the Senate was 75 to 5[2] and 362 to 14 in the House.[3]

Injunctive relief is an age-old concept, but for the purpose of this paper we need only go back to 1895 and visit the celebrated case *In re Debs*.[4] Here was established the principle that the power to issue injunctions and punish for their contempt in labor disputes is inherent in the court. In the *Debs* case the American Railroad Union combined for a strike, and an injunction was issued enjoining the members of that union "from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employees of said railroads to refuse or fail to refuse to perform any other duties as employees of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads or the transportation of passengers or property between or among the states."[5]

The *Debs* injunction was granted under the Sherman Anti-Trust Act and opened the flood gates of injunctive relief. That *In re Debs* was the starting point for injunctions and labor disputes may be shown from this calendar. In the 1880's 28 injunctions were issued;

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1. 75 Cong. Rec. 4052 (1932).
2. 75 Cong. Rec. 5019 (1932).
3. 75 Cong. Rec. 5511 (1932).
4. 158 U.S. 564 (1895).
5. *Id.* at 571.

after the *Debs* decision 122 were issued in the 1890's; and 328 were issued from 1900 to 1909.[6]

The Clayton Act, which was passed in 1914, was to remedy the abuses of the Sherman Act and to exempt labor unions from anti-trust laws. Section 6 of the Clayton Act stated as the policy of the act, "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members from such organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."[7] The Clayton Act was hailed by labor leader Samuel Gompers as the laborer's "Magna Carta".[8]

Interpretive emasculation of the Clayton Act started quickly and in 1921 the famous case of *Duplex Printing Press Company* v. *Deering*[9] held that the first paragraph of Section 20 of the Clayton Act —which provides that injunctions shall not be granted in any case between an employer and employees growing out of a dispute concerning terms and conditions of employment, unless necessary to prevent irreparable injury to property or to property right, of the party making the application, for which there is no adequate remedy at law, and that such property right must be described with particularity in the application which must be in writing and sworn to by the applicant or by his agent or attorney—merely declaratory of the law as it stood before. *Thus the laborer's "Magna Carta" was held to be nothing more than a re-enactment of the Sherman Anti-Trust Act, and the specific provision that labor unions were exempt from such injunctions was abrogated by the decision.*

In one way the position of labor was distinctly worse under the Clayton Act than it had been under the Sherman Act, for *under the act a private party could obtain injunctions* against the persons guilty of conduct in violation of these laws, whereas prior to the act, the federal government alone could sign injunctions against unlawful restraint of trade.

The aim of employers basically was not to secure a permanent restraining order but to secure a temporary restraining order. A

6. Witte, *The Government in Labor Disputes*, p. 84.
7. Cited by Rep. Celler; 75 Cong. Rec. 5488 (1932).
8. 21 American Federationist 971.
9. 254 U.S. 443, 469.

temporary order was the most impotant of all injunctive writs because strikes are usually won or lost within a few days and they were issued as a matter of course. Chief Justice Taft, explaining this before Congress, said, "The temporary restraining order is served upon all strikers; they are not lawyers; their fears are aroused by the process with which they are not acquainted, and, although their purpose may have been entirely lawful, their determination to carry through the strike is weakened by an order which they have never had an opportunity to question and which is calculated to discourage proceeding in their original purpose."[10]

This deterent was the purpose for which injunctions were sought. It broke the strike and compelled dissatisfied workers to perform services disagreeable to them.

The majority of injunctions signed by the judges were comprehensive documents enjoining workers from doing legal as well as illegal acts. Often times in restraining picket lines the court abridged the right to peaceful assembly and signed a writ which restrained "picketing, marching or congregating in the street near or in the vicinity of the premises of the plaintiff;[11] picketing plaintiff's factory within a radius of three blocks in all directions.[12]

There were restraints against speech, "abusive language," "annoying language", "indecent language", "bad language", "opprobious epithets", and specific words, such as "scab", "traitor", and "unfair".[13]

Forbidding workmen to go on strike was an object of the injunction,[14] notwithstanding the numerous decisions which upheld the worker's right to strike. In one case workers were enjoined from taking a vote on the question of a strike and from counting any such vote and "from reporting, writing, telegraphing or aiding or assisting in any manner related or connected with the taking, recording, or acting upon such a referendum.[15]

An injunction containing eviction notices was served upon striking coal miners[16] ordering them to get out of their houses by a specific date.

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10. Congressional Record, 60th Congress, First Session; Appendix 576.
11. Reed Co. v. Whiteman; 238 N.Y. 545, 144 N.E. 885 (1924) (Court of Appeals limited the injunction).
12. *Id.* at 546.
13. See *ex parte* Tucker, 110 Tex. 335 where defendant was discharged upon habeas corpus after conviction for contempt of an injunction against villifying, abusing or using opprobius epithets on the ground that the injunction was a violation of the State constitution.
14. Bausch Machine Tool Co. v. Hill, 231 Mass. 30, 120 N.E. 188 (1918).
15. A. R. Barnes & Co. v. Barry, 156 Fed. 72 (1907).
16. Clarkson Coal Mining Co. v. United Mine Workers, 23 Fl.2d 208 (1927).

In almost every injunction there was the catch-all or dragnet phrase "from doing any and all acts in furtherance of any conspiracies to prevent the free and unhindered control of the business of the complainants."

Appeals were rarely brought on injunction. Once the injunction was granted, the strikers' ferver was abated and the strike was lost. That the injunction successfully broke strikes and was rarely appealed may be seen from these figures. There were 118 reported applications for injunction in the federal courts between the years 1920 and 1927. Nine were denied. There were only 33 appeals from the restraining orders. In New York during the same period there were 37 applications. Nine were denied and seven were appealed.[17]

Blanket injunctions were frequently issued in this manner. The ..... Shoe Company vs. John Doe, John Roe and Mary Smith, names ficticious, real names unknown to the complainant, and all other persons unknown to the complainant and unknown to the court, hereby are ordered and enjoined.[18]

One extreme case shows the sweeping effect of an injunction which has unnamed defendants. In a railroad strike a dragnet injunction issued. A barber who was in no way connected with the strike displayed a sign in his wnidow saying, "No scabs wanted in here." He was found guilty of contempt of an injunction against "abusing, intimidating, molesting or annoying."[19]

In most jurisdictions there was more than one judge. An attorney could make an ex parte application for injunction, take it to the judge in the jurisdiction who was most liable to grant the remedy, and the restraining order was signed almost immediately. Between 1910 and 1919, 446 injuctions were issued, and between January 1, 1920, and May 1, 1930, 921 injunctions were granted,[20] and 300 injunctions alone were granted during the railroad shop craft strike during 1921.[21] During this last ten year period, the Clayton Anti-Trust Act, labors' "Magna Carta", which sought to limit the issuance of injunctions against labor unions, was in force. The Clayton Act was clearly not the answer to the injunction problem.

THE NORRIS-LAGUARDIA ACT

The Norris-LaGuardia Act, which was born on March 23, 1932,

17. Frankfurter & Greene, *The Labor Injunction*, Appendices 1 & 3.
18. 75 Cong. Rec. 5480 (1932).
19. U.S. v. Taliaferro, 290 Fed. 214, *Affd.* 290 Fed. 906 (1922).
20. Witte, *supra*, note 6, at 84.
21. Senator George W. Pepper, address to American Bar Ass'n., cited at 75 Cong. Rec. 4619 (1932).

after a 14 year period of gestation, attempted to correct the abuse of the injunctions. The 1928 Republican National Convention at Kansas City adopted a plank as follows, "the party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing which develops and maintains that peaceful cooperation which gains its first incentive through voluntary agreement.

"We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation."[22]

The Democratic National Convention at Houston, Texas, spoke as follows: "We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing, and the injunction should be confined to those acts which do directly threaten irreparable injury."[23]

A. PUBLIC POLICY

The Norris-LaGuardia Act, to avoid the pitfall that killed the Clayton Act, declares the policy of the United States in relation to labor disputes. "This is the first time in the history of the United States that an attempt has been made to declare, through an act of Congress, the public policy of the United States in relation to the issuing of injunctions in labor controversies. The object of setting up such a policy is to assist the courts in the proper interpretation of the proposed legislation. . . . there is no doubt whatever but that the Congress has the constitutional right to declare the public policy of the United States upon any question upon which the Congress has a right to legislate; and when such a public policy is declared, it becomes the duty of all the courts to give effect to such policy and carry it out in the enforcement of any law where such public policy has application.

Where Congress has not declared a public policy, it is within the province of the court to decide what the public policy is; but when such public policy has been declared by Congress, it is the duty of the court to follow such policy and to decide litigated questions related thereto in accordance with the poiicy thus declared by Congress. This doctrine has been repeatedly upheld by both state and federal courts."[24] The public policy declared in this act is as fol-

22. 75 Cong. Rec. 4502 (1932).
23. *Ibid.*
24. Senator Norris, 75 Cong. Rec. 4503 (1932).

lows: "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of owners associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and declaration of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the declaration of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."[25]

Senator Hebert of the minority members of the Senate Judiciary Committee disliked the declaration of policy of the majority members and submitted a policy of his own which he stated "more nearly approaches the pronouncement of the supreme court on the subject, that it deals more equitably and more fairly with both sides to any controversy and that it does justice to the employee without doing any injustice to the employer." The minority declaration of policy according to Hebert was based in part on Mr. Chief Justice Taft's opinion in *American Foundries* v. *Tri City Trade Council* (257 U.S. 209). Taft said at page 209:

"Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and carrying out their legitimate objectives. They have long thus been recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent, ordinarily, on his daily wage for the maintainance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employer and to resist arbitrary and unfair treatment. Union was assurance to give laborers opportunity to deal on equality with their employer. They unite to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to com-

25. 29 U.S.C. 102 (1932).

bine for such a lawful purpose has in many years not been denied by any court."

Having that language of the supreme court in mind, the following substitute declaration of policy was submitted to the Senate by Senator Hebert: "Whereas, under prevailing economic conditions a single employee is helpless in dealing with an employer, is ordinarily dependent on his daily wage for the maintainance of himself and his family, is unable to resist arbitrary and unfair treatment; and whereas it is essential (a) that he shall be free to associate with his fellow workers and to form unions which will afford him and them the opportunity to deal on a basis of equality with those by whom they are employed; (b) that they may share equitably in the production of labor and capital; (c) that both the employer and the employee shall have full benefit of association, organization and designation of representatives of their own choosing to negotiate the terms of employment free from any interference, restraint, or coercion in their efforts toward mutual aid or protection."[26] The Norris declaration stood.

B. THE YELLOW DOG CONTRACT

The next section of the Norris-LaGuardia Act deals with yellow dog contracts,[27] which, in the opinion of Senator Norris, should have been declared null and void instead of being enforced by the courts, because, (1) they were contrary to public policy under the common law; (2) they were entered into without consideration; and, (3) they were signed under duress and coercion.[28]

In 1917 the supreme court of the United States placed its stamp of approval upon such yellow dog contracts in the case of *Hitchman Coal and Coke* v. *Mitchell*.[29]

Senator Hebert of Rhode Island, while in sympathy with the section declaring yellow dog contracts unenforcible, had misgivings as

26. 75 Cong. Rec. 4677 (1932).
27. 29 U.S.C. 103 (1932).
28. 75 Cong. Rec. 4504 (1932). See also Rep. O'Connor, 75 Cong. Rec. 5464 (1932). This following contract is cited as an example of a yellow dog contract by Senator Norris, 75 Cong. Rec. 4626 (1932) "The undersigned applicant for employment by the Great Northern Railway Company has _____ (or at present employed) in consideration of the granting or continuance of such employment, hereby states and represents to the Great Northern Railway Company that he is not a member of or affiliated with the National Association of Machinists; the International Brotherhood of Bolier Makers, Iron Shipbuilders and Helpers of America; the National Brotherhood of Blacksmiths and Helpers; the Amalgamated Sheet Metal Workers International Alliance; the International Brotherhood of Electrical Workers; or the Brotherhood of Railway Carmen of America and agrees that during the entire period of such employment, he will not apply for membership in or become a member of, or affiliate with, or lend any support, financial or otherwise, to any of said organizations. Upon the failure of the undersigned to comply with the foregoing agreement, in every respect, it is agreed that this may be treated by the Great Northern Railway Company as a resignation from its employment and that such employment shall immediately cease.
29. 245 US 229 (1917).

to the constitutionality of such a provision. He stated in his argument, "There is serious doubt in my mind as to the power of Congress to legislate upon contracts and to deny to parties the right to enter into contracts. The right of contract is inviolate under the constitution; and the supreme court has repeatedly said that this contract (yellow dog) is the valid exercise of that right."[30]

In a further argument against the enactment of section three, Senator Hebert stated that, "The title of the bill is 'A Bill to Amend the Judicial Code and to Define and Limit the Jurisdiction of Courts Sitting in Equity.' We have limited ourselves to equitable proceedings."[31] In this argument Senator Hebert contended that the bill which affects the court sitting in equity cannot declare public policy on the matters of contract which actions on contracts are actions at law.

The constitutionality of Section 3 was upheld in the case of *Lauf* v. *Shinner*.[32]

C. SPECIFIC ACTS WHICH MAY NOT BE ENJOINED

Specific acts not subject to restraining orders or injunctions are enumerated in Section 4 of the Act. These nine specific acts were usually covered in blanket injunctions.[33]

Section 4A provides that ceasing or refusing to perform any work or to remain in any relation of employment shall not be enjoined. Senator Hebert argued that to provide that an employee may refuse to perform any work and yet continue in an employment relation is to place the stamp of approval by legislative enactment upon a breach of contract. Senator Hebert does allow, however, that the framers of the bill did not have such a purpose in mind, but that the paragraph was intended to place the employee outside of those injunctive processes which have been so broad as to compel an employee against his will to perform a given task. *The Bedford Stone Company* v. *Stone Cutters Association* (1274 U.S. 37) relying on the case of *Duplex Company v. Deering*,[34] held that the Stone Cutters Association union who refused to work on "unfair stone" produced by an anti-union quarry could be enjoined from such refusal, notwithstanding that the constitution of the Journeymen Stone Cutters Association provided, "No member of this association shall cut, carve or fit any material that has been cut by men working in

30. 75 Cong. Rec. 4679 (1932).
31. *Ibid.*
32. 303 U.S. 335 (1937).
33. Rep. Garber, 75 Cong. Rec. 5492 (1932).
34. *Supra* note 9.

opposition to this association.[35] This is the type of decision Hebert assumes the act was seeking to cure and he was sympathetic to the intent but impatient with the legislative language. Senator Hebert would have modified Section 4A to provide that no injunction would issue upon the ground that an employee had ceased or refused to remain in any relation of employment, eliminating the words, "ceased or refused to perform any work."

An opponent of the act, Representative Beck, cited two objections to Section 4. "First, Injunctions are to be largely limited to 'fraud or violence'." Mass picketing, intimidations, trailing, besetting, importing, libeling and false statements, are to be beyond the reach of injunctive relief.

Second, No injunction shall be issued against the organization and maintenance of strikes even where said strikers are called in violation of contracts, to extort graft, to compel the employer to commit a criminal act, to accomplish pooling purposes, to prevent freedom of choice, to prevent the use of products which the public desire to use, to coerce Congress and the executive."[36]

D. CONSPIRACY

Section 5 deals with the question of conspiracy, and states, "No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute, constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 104 of this title.[37] It became almost the universal practice for complaints in labor disputes to allege a conspiracy, a combination, a blanket conspiracy and combination; an indefinite thing — allegations lacking specifications but intended to bring into the case every possible suggestion or move made by every single person, singly or collectively, in any labor dispute. The question propounded by the majority members of the Senate Judiciary Committee who helped draft this legislation was, "If a thing done by an individual is lawful, how can you make out of that thing something vicious and criminal when two or more persons do the same thing?"

E. APPLICATION OF RULE OF AGENCY

According to Senator Blain of Wisconsin, the purpose of Section 6 was to extend the sound law of agency, which prevails in all other

35. 274 U.S. 37, 48 (1927).
36. Rep. Beck, 75 Cong. Rec. 5471 (1932).
37. 29 U.S.C. 105 (1932).

business transactions, to the officers, the members, the agents of organized labor.[38] Section 6 says, "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents except upon clear proof of actual participation in or actual authorization of such acts or of ratification of such acts after actual knowledge thereof."[39]

Senator Hebert urged in his argument against this section that it was not the establishment of a new law or agency but rather the creation of a new rule of evidence. He argued, "The provisions of Section 6 would alter that [law of agency] completely. It would be subversive of that principle of the law of agency. At first, in effect, if an employee or a man engaged in a labor dispute, acting on the orders from him who directs that labor dispute, commits an unlawful act, then the director of that labor dispute under whom a given employee is operating, will not be liable for the consequences of such unlawful acts 'except upon clear proof of actual participation in or actual authorization of such act or of ratification of such act after actual knowledge thereof.'"

An amendment drafted by Senator Hebert would have provided "that in any contempt proceedings based upon the commission of such acts if the person charged makes it clear that he did not actually participate in or actually authorize or actually ratify such act, he shall be entitled to a public trial by an impartial jury. In this way members of organizations engaged in labor disputes and their offices as well, will be fully protected and at the same time the provisions of the existing law will in no way be subverted."[40]

Arguing on this same point, Representative O'Connor held, "Section 6, which, like the other section of the bill, applies alike to organizations of employees as well as employers, remedies a grossly unfair practice that has grown up of holding officers and members of unions liable for damages for the acts of other members without proof of participation or direction or ratification of such acts. The bill merely requires actual proof of such participation, direction, or ratification before the officers or other members can be held liable. If this be a change in the 'law of agency' as some claim, it is at most a change in the rule of evidence in civil cases only, a power well recognized as lodging in Congress."[41]

38. 75 Cong. Rec. 4629 (1932).
39. 29 U.S.C. 106 (1932).
40. 75 Cong. Rec. 4687 (1932).
41. 75 Cong. Rec. 5463 (1932); see Bailey v. Alabama, 219 U.S. 238.

F. ISSUANCE OF AN INJUNCTION

Senator Norris, explaining Section 7 and at the same time arguing in its behalf, uttered this monologue, "Mr. President, this bill in Section 7 provides for the procedure which shall be followed in case application is made for a restraining order or a temporary or permanent injunction. It provides that before a temporary or permanent injunction shall be issued, there must be an opportunity for the defendants to be heard, and that at such hearing they shall have the right to cross-examine witnesses who testify in behalf of the issuing of such an order. The court must also permit the defendants to offer witnesses and to take their oral testimony in open court; and the court is not authorized to issue a temporary injunction after such hearing unless the court finds that unlawful acts have been committed and will be committed unless restrained; that as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the denial of relief; and that complainant has no adequate remedy at law. *The bill also provides that no temporary or permanent injunction shall be issued unless the court finds that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.* The bill, however, permits a temporary restraining order without notice, but in order to secure this, the judge issuing the order must take the testimony, under oath, of witnesses, and the evidence must be sufficient, if sustained, to justify the court in issuing an injunction upon hearing the notice.

In other words, a restraining order without notice cannot be issued except upon the sworn testimony of witnesses, and that testimony must be sufficient to sustain an injunction in case the same evidence were offered with notice.

"This can be no hardship to the complainant in the case. If the plaintiff is not able to produce sufficient evidence without notice, certainly he would not be able to produce sufficient evidence with notice. The greatest danger of damage comes in cases where restraining orders or temporary injunctions are issued without any notice to the defendants. This, in effect, takes away the protection with which the law always tries to surround the defendant by requiring that a summons be served or notice given before any judgment shall be rendered against him. It must also appear, before a temporary restraining order can be issued without notice, that the giving of the notice would of itself result in irreparable damage to the complainant's property.

"A restraining order without notice under the bill shall not be in force longer than five days. The usual provision for the giving of bond before the issuing of such temporary order is also provided for.

"It is also provided in section eight, that no restraining order or injunction [sic] relief, shall be granted to anyone who has failed to comply with any obligations imposed by law which is involved in a labor dispute in question or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any governmental machinery provided for arbitration."[42]

In concluding his argument, Senator Norris referred to the record of Judge Wilkerson in the issuing of injunctions in labor disputes, and by his narrative argues on behalf of Section 7 and 8. The Senator at page 4509 of the *75th Congressional Record* says, "Judge Wilkerson was appointed as District Judge by President Harding, under the advice and at the suggestion of Attorney General Harry N. Daugherty. Hardly was the ink on the commission dry before the same Attorney General applied to this judge and secured of him a sweeping injunction applying to many thousands of railroad employees. This injunction was issued at a time when the dispute between the railroads and their employees was in a fair way of settlement, and contained many of the obnoxious provisions which are invariably included in labor injunctions."

Senator Hebert of the minority membership argues on Section 7 as follows, "Section 7 of the bill provides that no restraining order or injunction shall be issued in a case growing out of a labor dispute except after hearing the testimony of witnesses in open court.

"The section then proceeds to outline certain findings of fact which must be heard prior to the issuance of a restraining order or injunction. The first requirement is that unlawful acts have been committed and will be continued unless restrained.

"Many of the restraining orders and injunctions heretofore issued in labor disputes were much more far reaching in their effect than the occasion required. Proof to sustain this view may be found in the decisions of the supreme court. I am in sympathy with the purposes sought to be attained by this part of the bill, but I believe it should be modified in some respects. Under paragraph A of this section the owners of property may not have relief where acts of destruction are contemplated or threatened and must have actually suffered injury before he can secure a restraining order or injunc-

42. 75 Cong. Rec. 4508 (1932).

tion. Courts should be left free to restrain anyone from engaging in unlawful acts and before they are committed.

"There is no element of justice in a provision of law which would permit one citizen to destroy the property of another before any court shall have the power to restrain him.

"The effect of this provision would be to work hardship upon employees as well as upon employers, because in the event that an employer should threaten to commit an unlawful act against the interests of the employee, the employee would have no redress, but would be required to wait until after the act had been committed before asking for a remedy. In other words, there can be no injury to a wrongdoer if he be restrained from continuing his wrongdoing.

"Paragraph C of Section 7 brings in the law of comparative negligence. In cases of comparative negligence both parties are at fault, and the question of which one is liable is determined by a comparison of the fault of each. In the case of injunctive processes to restrain illegal acts, such as violence and threats, no injury can, in contemplation of law, be suffered by the party who is restrained from continuing illegal acts. Paragraph C makes no distinction between acts which are lawful and those which are not. It simply provides that as to the measure of relief granted the court must find the greater injury will be inflicted upon the complainant by the denial of the relief than will be inflicted upon the defendant by the granting of it.

"Paragraph E of Section 7 would require a complainant to show affirmatively that the public officers charged with the duty to protect his property are unable or unwilling to furnish adequate protection."[43] All such officers are required to be given personal notice and as this provision is now worded; it might be construed to mean that every police officer in a city or town of whatever size must have notice and must testify in any proceedings which may be had for injunctive relief. It would impose an unusual burden upon a complaint; first, to ascertain the names and the duties of all officers charged with the protection of property; and second, to prove that they have failed to afford protection or that they are unable to do so.

"I can well imagine the burden placed upon a complainant where he sought to have relief in injunction proceedings in a city the size of New York, for instance, where he would be called upon to establish affirmatively either that the police or those charged with the

43. 75 Cong. Rec. 4687 (1932).

enforcement of the law or the protection of his property were unable to afford protection or were unwilling to do so."[44]

Senator Hebert wished to amend the act by eliminating Section 7E from the bill and then says, "I assume that none of the law officers would admit that he was unwilling to enforce the law, and perhaps few, if any, would admit that they were unable to do so; but the more serious objection to this section, as it is worded, is the requirement that all of the officers charged with the duty to enforce the law shall be notified. It is easy to contemplate what an obligation rests upon the complainants under this provision if in a city like New York, for instance, the officers charged with the enforcement of the law are to have notice before an injunction may issue; but that, of course, is an extreme case.

"If this provision were limited to the sheriff of the county or their chief of police of the city where the property is located, there might be some reason for its inclusion in the bill; but, the section reads, it seems to me to be impossible of enforcement."

Senator George, on the same section, questions the necessity of the section, and the following dialogue ensued:[45]

Senator George: "I can very well see why the section should remain in the bill because I can understand, when a complainant in equity is asking an injunction, that he should be able to show that he is not able to protect his property through the ordinary processes of law. But I cannot see any real reason why notice should be given to any officer, because we can have in an equitable proceeding no substantial relief against an officer. The court certainly would not undertake to direct him or enter any judgment against him or in any wise effect him by its final order."

Senator Walsh of Montana: "Let me tell the Senator what induced the committee to include those words."

Senator George: "I shall be very glad to know."

Senator Walsh: "Under sub-division E it will be observed that the complainant seeking the injunction must represent that the public officer charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Senator George: "I quite agree that that ought to be included. I think it may well be included."

Senator Walsh: "I understand the Senator agrees that it may well be included, but we do not want to make that imputation against the officers without giving them an opportunity to reply to it, and so notice is to be given to them that they may come in and say, if they can say so, 'We are perfectly able to take care of the situation.' We do not want to allow their integrity as officials

44. 75 Cong. Rec. 4996 (1932).
45. 75 Cong. Rec. 4998 (1932).

to be impunged without giving them opportunity to be heard on the matter."

Senator George: "I can see how that is commendable, and yet it is wholly unnecessary because there is no need of making anybody a party to the litigation unless we are going to have some substantial relief against that party. I rather think it is a dangerous provision for the reason that the defendant officers or respondent officers may come in and swear off the equity of the bill."

Senator Walsh: "Let me remark that the officers will not be made parties to the proceeding at all."

Senator George: "I thought the notice was to make them parties."

Senator Walsh: "Oh, no, Observe the language. 'Such hearing shall be held after due and personal notice thereof has been given in such manner as the court shall direct to all persons against whom relief is sought and also to the chief of those public offices of the county or city — and so forth. No relief is sought against them, but they are given the opportunity to come into court."

Senator George: "It is not the purpose of the bill to make them formal parties?"

Senator Walsh: "By no means."

Senator George: "Then, that removes, of course, the objection I had in mind. If they were made formal parties we would have frequent cases where the whole equity of the bill would be sworn away by the respondents."

Representative Beck, speaking of the public officials protection clause, finds such an inquiry would be an affront to the authorities of the state;[46] but his colleague, Representative O'Connor, argues, "*The court should not exercise police power if the constituted authorities are willing and able to perform that function.*

"There are, however, exceptional cases in which the federal courts may issue a temporary restraining order without notice, if necessary, to prevent irreparable injury to property. The court must first, however, take testimony under oath rather than by affidavit, and such an order is affected for only five days."[47]

At the end of his argument as leader of the minority members of the committee, Senator Hebert addressed the Senate, "In conclusion, Mr. Prsident, I repeat, that I have no disposition or intention to delay or to interfere with the passage of this bill. I shall offer amendments as we proceed with its consideration which I believe will more fully protect the interests of all parties of labor disputes. I have been informed that labor organizations themselves have many amendments to propose to this bill. It may be that some of those

46. 75 Cong. Rec. 5472 (1932).
47. 75 Cong. Rec. 5464 (1932).

which they intend to offer or which are to be offered at their instance may carry out the purposes which I myself have in mind. I firmly believe that the substitute which I have proposed will prove satisfactory to everyone. It will relieve the laboring man from the injustices which grew out of that form of contract which is so obnoxious to American citizens; it will remove, so far as they can be removed, the well-founded objections to some of the injunctive processes which have been issued in the past in labor disputes; it will curb the power of the courts to legislate by injunction as it is claimed they have done and will afford to every citizen the right to a trial by jury, guaranteed him by the courts."[48]

G. "CLEAN HANDS"

Section 8 of the bill might be called the "Clean Hands" provision of the measure. So Representative O'Connor suggested. That section provides that a complainant shall not be entitled to an injunction if he has not complied with any contract or obligation on his part or has not made every reasonable effort to settle the dispute by the available methods of arbitration or mediation. Surely, this fundamental principle of equity that "he who seeks justice must do justice" should apply in labor disputes as well as in other judicial controversies.[49]

Representative Beck prophesied the opposite result thusly, "Although the defendants may, without notice, organize industrial war through fraud, violence and other unlawful acts, the plaintiff shall not receive injunctive relief unless he first endeavors 'to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or arbitration.'

"The aggressor may act without notice, but the aggrieved may not defend himself by securing injunctive relief without tolerating the violence until he has gone through various steps of peaceful negotiation. While plaintiff is negotiating, the situation may become beyond any possibility of judicial relief."[50]

IV CONCLUSION

Injunctions have been granted under the Norris-LaGuardia Act both in the federal courts and in our state court under Section 34-08. This legislation was not passed to forbid the granting of injunctions, but rather it was passed to correct the abuse of injunctions. Injunc-

48. 75 Cong. Rec. 4996 (1932).
49. 75 Cong. Rec. 5464 (1932).
50. 75 Cong. Rec. 5472 (1932).

tive writs are harsh and should not be granted for light or transitory reasons. Chief Justice Taft, in an interview, summed up in a pithy remark what scores of legislators and legal experts have said in volumes. In 1919, Taft said, "Government of the relations between capital and labor by injunction is a solecism. It is an absurdity. Injunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger."[51]

51. Philadelphia Public Ledger, Nov. 20, 1919, p. 8.

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