Labor's Charter of Rights

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L A B O R ' S C H A R T E R O F R I G H T S

by

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SECTION 7(a) of the National Industrial Recovery Act, which for a limited period of two years has given workers the right to organize and bargain collectively through representatives of their own choice, will cease to be law on June 16, 1935. To reaffirm these rights, to make them truly effective, and to establish permanent machinery for their enforcement, the Wagner-Connery National Labor Relations bill has been introduced in Congress.

This permanent legislative measure, which is of vital importance to the industrial welfare of the nation, was placed before the Senate of the United States last February by Senator Robert F. Wagner of New York. An identical bill has been introduced in the House of Representatives by Representative William P. Connery, Jr., of Massachusetts. Enactment of this law is imperative to give American wage-earners the long-needed protection of their fundamental rights, will make real their freedom of association, and will do away with many of the present gross inequalities between labor and management in collective bargaining.

The several sections of this article summarize, as briefly as possible, the aims and purposes of this measure and explain the significance of collective bargaining in our industrial life.

In presenting the various phases of industrial relations, the testimony of witnesses appearing before the Senate Committee on Education and Labor in support of the Wagner Bill, has been heavily drawn upon. This material includes excerpts from the initial statement before the Committee by Senator Wagner and from the basic evidence presented on behalf of organized labor by President William Green of the American Federation of Labor. The material also contains excerpts from the testimony from the following witnesses who appeared before the Committee: Lloyd K. Garrison, Dean of the University of Wisconsin Law School and first Chairman of the National Labor Relations Board; Francis Biddle, the present chairman of the National Labor Relations Board; Edwin S. Smith and Harry Alvin Millis, members of the Board; and Charlton Ogburn, Council for many American Federation of Labor unions.

I. The Wagner Bill

The board purposes of the National Labor Relations Bill are summarized in its Declaration of Policy:

Equality of bargaining power between employers and employees is not attained when the organization of employers in the corporate and other forms of ownership association is not balanced by the free exercise by employees of the right to bargain collectively through representatives of their own choosing. Experience has proved that in the absence of such equality the resultant failure to maintain equilibrium between the rate of wages and the rate of industrial expansion impairs economic stability and aggravates recurrent depressions, with consequent detriment to the general welfare and to the free flow of commerce. Denials of the right to bargain collectively lead also to strikes and other manifestations of economic strife, which create further obstacles to the free flow of commerce.

It is hereby declared to be the policy of the United States to remove obstructions to the free flow of commerce and to provide for the general welfare by encouraging the practice of collective bargaining, and by protecting the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing, for the purpose of negotiating the terms and conditions of his employment or other mutual aid or protection.

The crux of the bill

The measure guarantees to the employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." It establishes the principle of majority rule and makes illegal company-dominated unions. Interference with, and restraint or coercion by management of employees in the exercise of their rights are outlawed by this bill and discrimination against workers because of their union membership is similarly proscribed. Finally, the bill creates a new National Labor Relations Board with exclusive jurisdiction over all labor disputes, except among railway employees, and with jurisdiction over all labor boards.

The general significance of the proposed law is best brought out in Senator Wagner's testimony before the Senate Committee:

> The National Labor Relations Bill does not present a single novel principle for the consideration of Congress. It is designed to further the equal balance of opportunity among all groups that we have always attempted to preserve despite the technological forces driving us toward excessive concentration of power and wealth.
>
> The first of these attempts that has contemporary significance was the Sherman anti-trust law, enacted in 1890 to

protect the laborer, the small business man and the consumer from the dangers of unregulated monopolies of capital. The failure of that noble undertaking demonstrates the impossibility of trying to swim against the currents of economic development. The early dissolution of the Standard Oil Company was more spectacular than realistic. The rule of reason enunciated in that famous case soon came to mean that the courts found little reason in the anti-trust laws. During the flowering of American enterprise between the World War and 1930, 40.7 per cent of the net income earned by all of the non-financial corporations in the country went to the 200 largest. The annual number of recorded mergers mounted from 89 in 1919 to 221 in 1928, while the number of concerns involved in these mergers more than tripled yearly. The right of business to combine was virtually unchallenged.

One may rake the debates preceding the passage of the Sherman Act with a fine-toothed comb and not find any indications that the law might be used to harass and impede the laborers and consumers it was designed to protect. But that has been the paradoxical fate of labor, and also of the vast majority of consumers whose share of the national income depends upon the reward they receive as employees.

The famous Danbury Hatters case, 208 U. S. 274 (1908), was the harbinger of future events when it declared unequivocally that the anti-trust laws applied to labor as well as to capital. A long procession of cases following this decision moved Congress in 1914 to write the Clayton Act, declaring that labor organizations should be allowed to pursue their lawful and legitimate objectives, and that no injunction should issue in a dispute between employers and employees except when necessary to prevent irreparable injury.

Undaunted by this clear pronouncement, the Supreme Court, in Duplex Printing Press Co. vs. Deering, 254 U. S. 443 (1921), upheld an injunction against a secondary boycott by employees. Mr. Justice Pitney wrote:

"In determining the right to an injunction under that (the Clayton Act) and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful under common law or under the statutes of particular states. Those acts, passed in the exercise of the power of Congress to regulate commerce among the states, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful under common law or under local statutes."

Thus the learned justice reasoned that Congress, in excluding from the prohibition of the anti-trust laws all lawful acts of labor organizations, had intended to exclude only those acts that were lawful under the anti-trust laws.

Mr. Justice Pitney had another hurdle to overcome, for section 20 of the Clayton Act prohibited injunctions in disputes between employers and employees. But he decided that the statute referred only to an employer and his employees, and therefore did not cover a secondary boycott. Mr. Justice Brandeis, with a keener perception of economic realities, was joined in dissent by Mr. Justice Holmes and Mr. Justice Clarke.

Soon after this, the court placed the crown upon this body of judicial error. In American Steel Foundries vs. the Tri-City Central Trade Council, 257 U. S. 184 (1921), it declared that the Clayton Act "introduced no new principle into equity jurisprudence of those courts. It is merely declaratory of what was the best practice always."

While the courts were extending federal power over labor disputes in this manner, they were deciding other cases affecting the substantive rights of employees. In the Tri-City case, an employee organization was denied the right to place more than one peaceful picket near the entrance to a building, and the court added that "the name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion." In Truax vs. Corrigan, 257 U. S. 312 (1912) an Arizona Statute substantially similar to Section 20 of the Clayton Act was declared unconstitutional.

The high-water mark of the adverse flood came in Bedford Cut Stone Co. vs. Journeymen Stone Cutters' Association, 275 U. S. 37 (1927). In this case a small group of craftsmen had refused to work upon stone which had been shipped into the state from quarries in other states where non-union labor was employed. The way for declaring the legality of the peaceful secondary boycott had been blazed by high courts in New York and California (Bossert vs. Dhuy, 221 N. Y. 342 (1917), and Pierce vs. Stablemen's Union, 156 Cal. 70 (1909). But the Supreme Court found a violation of the anti-trust laws and sustained an injunction. The voice of Mr. Justice Brandeis was heard in protest:

"The Sherman law was held, in United States vs. the United States Steel Corporation, to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States, dominating the trade through its vast resources. The Sherman Law was held in United States vs.

the United Shoe Machinery Co. to permit competitors to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same action willed to deny to members of a small craft of workmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers."

While the effect of court decision was to turn against the worker and the consumer a statute which was designed for their benefit, other cases were sweeping aside the direct attempts of Congress and of the states to benefit these groups. In Adair vs. United States, 208 U. S. 161 (1907), over the dissents of Mr. Justice Holmes and Mr. Justice McKenna, and in Coppage vs. Kansas, 236 U. S. 1 (1914), with Mr. Justice Holmes, Mr. Justice Day, and the then Associate Justice Hughes dissenting, statutes making it a crime to discharge men for union membership were declared unconstitutional.

I have engaged in this summary discussion of legislation and decided cases because they present in brief and bold outline the full sweep of events. But they are largely the shadow of profound social and economic developments. * * *

The main provisions of the present bill define four unfair labor practices, and provide suitable means of preventing them. Let us examine how well grounded these prohibitions are in established Congressional policy, to what specific evils they are addressed, and what their implications are. I wish to state at the outset that this bill is an entirely new draft, and that it must not be interpreted in the light of whether or not it contains provisions that were in the bills upon the same subject before Congress last year.

The first unfair labor practice in substance forbids an employer to interfere with, restrain, or coerce employees in the exercise of their right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

This language follows practically verbatim the familiar principles already imbedded in our law by section 2 of the Railway Labor Act of 1926, section 2 of the Norris-La Guardia Act, section 77(p) and (q) of the 1933 amendments to the Bankruptcy Act, section 7(a) of the National Industrial Re-

covery Act, and section 7(e) of the act creating the office of the Federal Coordinator of Transportation.

Long experience has proved, however, that courts and administrative agencies have difficulties in enforcing these general declarations of right in the absence of greater statutory particularity. Therefore, without in any way placing limitations upon the broadest reasonable interpretation of its ominous guarantee of freedom, the bill refers in greater detail to a few of the practices which have proved the most fertile sources for evading or obstructing the purpose of the law.

Thus the third unfair labor practice makes it illegal for an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This provision is merely a logical and imperative extension of that section of the Norris-La Guardia Act which makes the yellow-dog contract unenforceable in the federal courts. If freedom of organization is to be preserved, employees must have more than the mere knowledge that the courts will not be used to confirm injustice. They need protection most in those very cases where the employer is strong enough to impress his will without the aid of the law. And it is perfectly obvious that unfair pressure may be exercised by discrimination in terms of employment as well as by actual discharge.

The fourth unfair labor practice, forbidding discharge or discrimination because an employee has filed charges or given testimony under this measure, is self-explanatory. * * *

During the second half of last year and the first month of 1935, controversies embracing 1,333,041 workers came before the Regional Labor Boards. Certainly this was a large enough volume for sampling purposes. Of the 3,655 new cases received by the National Board during the period, violations of Section 7(a) were involved in 3,230 of them, or about 74 per cent.

Our alternatives are clear. If we allow Section 7(a) to languish, we shall be confronted by intermittent periods of peace at the price of economic liberty, dangerous industrial warfare, and dire depressions. On the other hand if we clarify that law and bolster it by adequate enforcement agencies, we shall do much to round out the program for a balanced economic system founded upon fair dealing and common business sense. The latter course is charted by the National Labor Relations Bill before the Committee. * * *

This bill has been branded radical by some and ultra-conservative by others, but everyone of its principles has been

sanctioned by a long train of laws of Congress. It has been called inopportune and hasty. But is it not time to act upon the ominous industrial disturbances of last summer, when blood ran freely in the streets and martial law was in the offing? Is it not time to note that during the last half of 1934 and the first month of this year almost three quarters of a million workers were sent back to their jobs or kept from leaving them by the National Labor Relations Board and its regional agencies?

This bill has been called one sided, and directed against industry. If this criticism could be sustained it would certainly be decisive. American industry is deserving of every consideration. It has played a tremendous role in developing economically the greatest nation in the world, with the highest standards of living for people in all walks of life. Industry as a whole has met the problems of the recent depression, and the immediate problems of industrial unrest, with heroic courage, resourcefulness and public spirit. It will continue to exert the same profound influence and fine leadership in American life. Upon its welfare depends the welfare of all. The Congressional duty to help industry solve its difficulties is coincident with the duty to help workers or consumers.

But the proposed measure is not derelict in its duty to all. Is not economic strife a curse to every group? Is not industrial peace beneficial to all? Has not every step in the New Deal program attempted to embrace the interests of the public at large? Is there a single right guaranteed to employees by this measure which employers do not already enjoy? The new law will apply the healing balm of an upright, impartial and peaceful forum to industry and labor, and thus will benefit employers, workers, and the country at large.

II. Some Constitutional Problems

The status of the proposed measure in constitutional law is discussed in Senator Wagner's testimony:

There are two broad constitutional questions involved: First, does the regulation of the employer-employee relationship as herein provided violate due process of law; and, secondly, can federal jurisdiction over this relationship be sustained under the commerce power?

The power of Congress to guarantee freedom of organization, to prohibit the company-dominated union, and to prevent employers from requiring membership or non-membership in any union has been upheld completely in Texas and New Orleans R. R. Co. vs. Brotherhood, 281 U. S. 548 (1930). This was a suit by a labor union to restrain the railroad from interfering

with the right of its employees to self-organization and the designation of representatives, in violation of the Railway Labor Act of 1926. The decree of the lower court provided that the railway company should: (1) Completely disestablish its company union; (2) Reinstate the Brotherhood as representative until the employees, by secret ballot, should make a choice; (3) Restore to service and to stated privileges certain employees who had been discharged for activities in behalf of the Brotherhood. The Supreme Court, with Chief Justice Hughes writing for a unanimous Court sustaining the decree, wrote:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. . . Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. * * *

Thus, the Supreme Court sustained a decree prohibiting in substance all except the last of the unfair practices listed in this bill, and it is particularly significant that this decree was based upon a law containing only the first of these practices.

Brushing aside the much criticized earlier cases that had declared the prohibition of the yellow-dog contract unconstitutional, Chief Justice Hughes said:

> The petitioners invoke the principle declared in Adair vs. United States, 208 U. S. 161, and Coppage vs. Kansas, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers, but with the interference of the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections they cannot complain of the statute on constitutional grounds.

That is very important language and many of our employers still do not agree to that philosophy.

When we realize that this prevailing and unanimous opinion of the Chief Justice follows precisely the line of reasoning that he followed when dissenting in the Coppage case, and that the two cases are

really identical in principle, we cannot doubt that Coppage vs. Kansas and Adair vs. U. S. have been overruled. Let me quote the reasoning of the present Chief Justice, then an Associate Justice, in the Coppage case:

> There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will. The question now presented is, may an employer, as a condition of present or future employment, require an employee to agree that he will not exercise the privilege of becoming a member of a labor union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the question controlled by different principles. The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions . . . the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the states.

It is true that the Texas Case involves the interests of railway workers, but its decision on the question of due process is equally applicable wherever Congressional jurisdiction over interstate commerce can be established. Let us now examine the grounds for federal jurisdiction.

A vast number of strikes have arisen in protestation against the denial of the rights guaranteed by Section 7(a) of the Recovery Act and re-affirmed by the present bill. Certainly many of these outbreaks would be prevented if these rights were secured. And that strikes burden commerce cannot be denied. In the Bedford Stone Cutters case (Supra), the stone cutters had refused to work upon a stone shipped into states from quarries in other states where non-union labor was employed. The court held this a violation of the anti-trust laws on the ground that refusal to work upon this stone necessarily decreased the orders for more stone from the quarries in other states and thus affected interstate commerce. That is how far they have gone.

If the court can take so broad an interpretation of commerce, when the result of so doing is to frustrate the attempt of the wage earner to better his economic conditions, it certainly should take an equally broad view when acting to diminish strikes by preventing the unfair labor practices which provoke them. And it is clear that these practices may be enjoined before the strike occurs. As Chief Justice Taft said in the first Coronado Case, 259 U. S. 344 (1933):

> If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain,

or burden it, it has the power to subject them to national supervision or restraint.

In fact, none of the cases under the anti-trust laws has gone to the constitutional limit of federal power over interstate commerce. Where the court has refused to enjoin strikes, it has not been for lack of such power, but because the burden upon commerce was not deemed such as the anti-trust laws intended to prohibit. Statutory construction of these laws has fixed the boundaries. But the federal government has the power within the constitution to prevent any burden whatsoever upon interstate commerce. And there can be no doubt that Congress intends this power to be exercised in full to prevent unfair practices that cause or threatened to cause even the slightest burden.

I want to emphasize even more strongly the constitutional power and the intent of Congress to prohibit these unfair labor practices even where they do not lead or threaten to lead to strikes. Under our present economic system, collective bargaining is one of the essentials for maintaining an adequate distribution of purchasing power among the population generally. The impairment of collective bargaining is likely to intensify the maldistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and bringing on depressions with their devastating effect upon the flow of commerce. The theory of the Recovery Act is that wage fixing by means of codes may bear a direct relationship to interstate commerce. If that is true, other processes of fixing wages, such as collective bargaining, have an equally important bearing upon such commerce.

The Supreme Court already has recognized the relationship between prices and commerce. In Chicago Board of Trade vs. Olsen, 262 U. S. 1 (1922), upholding the validity of federal regulation of boards of trade at terminal markets, the court said:

> The question of price dominates trade between the states.
>
> In effect upon commerce, wages are undistinguishable from prices.

In the more recent case of Appalachian Coal vs. United States, 53 Supreme Court 471 (1933), the present Chief Justice recognized in dramatic language the relationship between general business conditions and the flow of commerce. He wrote:

> The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.

This language is no less applicable when Congress has declared that the lack of enforcement of the right to bargain col-

lectively is having an adverse effect upon the maintenance of sound economic conditions.

While this bill does not intend to go beyond the constitutional power of Congress, it goes to the full limit of that power in preventing these unfair labor practices. It seeks to prevent them whether they affect interstate commerce by causing strikes, or by destroying the equivalence of economic forces upon which the full flow of commerce depends, or by occurring in interstate commerce.

The recent decision in the Weirton case is based upon Judge Nields' finding that the activities of the Weirton Company union did not interfere with the freedom of employees to organize, as guaranteed by Section 7(a) of the Recovery Act. It seems clear that this decision is far out of line with that of the United States Supreme Court in the Texas and New Orleans case, to which I have referred, and which held that activities similar to those at Weirton were illegal under the Railway Labor Act of 1926, an Act no more specific in its terms than Section 7(a). Not a single lawyer with whom I have talked has been able to explain Judge Nields' failure not only to distinguish, but even to refer to the Texas case. But even if it were to be conceded that Judge Nields correctly interpreted Section 7(a), his decision merely emphasizes the need for strengthening that section and creating a permanent administrative tribunal, versed in the complexities of labor relations, to deal with such matters.

Since Judge Nields found that Section 7(a) does not outlaw the activities complained of at Weirton, his discussion of the constitutionality of that section is pure dictum. I cannot believe that this dictum of a single district judge as to the extent of the power of Congress to regulate interstate commerce will weigh very heavily with this committee, particularly since his limited concept of interstate commerce, while in line with many early decisions of the U. S. Supreme Court, is clearly at odds with later decisions of our highest court which I have discussed, and which are responsive to the changing character of our national economic life.

III. Collective Bargaining

Collective bargaining is the process of negotiation between two parties, one of whom represents the management and the other represents the employees organized in independent unions for concerted action, resulting in an agreement as to terms and conditions of employment. It is a device, used by wage earners to safeguard their interests, which has come to be an integral part of our modern industrial organization.

The purpose of collective bargaining is achieved only when it results in a bargain in the form of an agreement binding upon both par-

ties for a definitely prescribed period of time. This makes collective bargaining an effective means of stabilizing labor relations in industry and of maintaining industrial peace.

As now practiced, collective bargaining may take place on a local, regional or national basis and assume a number of forms. A single employer may bargain with his employees represented by one union; a local group of employers with a number of groups of employees, as the building contractors of a city with the several unions in the building trades; a number of regional groups of employers in an industry with the employees of a single craft, as the railroad companies with the locomotive engineers; a group of employers with all their employees as the bituminous coal operators and mine workers in a given region. As in the case of foundry employees, or elevator constructors, bargaining negotiations may take place between a national union of employees and a national association of employers, being consummated in a nation-wide collective agreement.

It is through the resulting trade agreement that collective bargaining becomes an agency of industrial order. The trade agreement, which specifies hours, wages and other conditions under which jobs and workmen are to be brought together in production, is normally built up by a slow and gradual process of periodic revision. Through repeated collective negotiations a trade agreement is gradually made more comprehensive and results in substantial betterment of the economic position of the workers.

The trade agreement is first of all concerned with wages and hours of work. It is then extended to the methods of wage payment and specific phases of compensation such as remuneration for overtime work. The agreement also provides for protection of seniority status whereby hiring and firing could not be made arbitrary. It usually lays down in detail the conditions of work covering technical practices, safety rules and special employment problems. One important aspect of the trade agreement is that it establishes specific rules of procedure for administering the terms of the agreement and for adjusting any disputes which may arise while the agreement is in effect.

By giving formal acceptance and sanction to customs, practices and procedures which have grown up in an industry, and by opening a channel for orderly adjustment of new problems, the trade agreement provides an important basis for stability in employer-employee relations. By imposing a solemn obligation of performance on both sides, the agreement not only gives the much-needed security to the worker but safeguards the employer from disorder or interference with the normal process of production at his plant.

This basic summary of what collective bargaining means, reduced to its simplest possible terms, falls directly in line with the discussion

of collective bargaining by the National Labor Relations Board in the Houde decision. In this decision the Board stated:

> The fundamental purpose of Section 7 (a) was to encourage collective bargaining, with all that that implies. Employees were to "have the right to organize and *bargain collectively*" and to be free from interference in self-organization "*for the purpose of collective bargaining.*"
>
> These phrases are full of meaning. The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. Without this duty to bargain the right to bargain would be sterile; and Congress did not intend the right to be sterile. * * *
>
> It (the statute) was not enacted to promote discussions. Such an anemic purpose was foreign to the Recovery Act. The statute was enacted to promote the making of collective agreements covering terms of employment for definite periods, as an integral part of the process of stabilizing industry upon a new and juster basis. * * *

In this connection, Chairman Francis Biddle of the National Labor Relations Board said the following in his testimony before the Senate Committee:

> The basic features of the Wagner Bill are that it establishes the right of collective bargaining and majority rule in unmistakably clear terms; defines unfair labor practices and provides a simple and already well-recognized method of enforcing the law.
>
> The right of employees to self-organization and to collective bargaining is defined in Section 7 of the Act. The National Labor Relations Board has, in the Houde and other cases, found a corresponding duty on the part of the employer to bargain collectively with his employees, since a declaration by Congress of their right would have been sterile without such a corresponding duty. Senator Wagner in his testimony before the Committee yesterday argued along these lines, that the duty of the employer to bargain collectively was implied from the right of the employees to bargain, and that a failure to bargain would, therefore, be an interference with the right. However, there has been so much disagreement and confusion with respect to the employer's duty to bargain collectively that I believe this duty should be expressed in the Act, and suggest that the following be added as subdivision (5) of Section 8, which Section defines unfair labor practices: "(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

The principle of collective bargaining is expressed in the Norris-LaGuardia Anti-Injunction Act, in Section 2, which recognizes that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor"; and Section 77 of the Bankruptcy Act provides no judge or trustee acting under the Act "shall deny or in any way question . . . the right of employees to join the labor organization of their choice and it shall be unlawful for any judge, trustee or receiver to . . . use the funds of the railroad in retaining so-called company unions or to influence or coerce employees in an effort to induce them to join or remain members of such company unions." This finds an analogy in Section 8 of the Bill defining it as an unfair labor practice for an employer to contribute financial or other support to a labor organization.

IV. Enforcement

Section 7(a) of the National Industrial Recovery Act has failed to achieve its basic purpose—of protecting the workers' right to organize and bargain collectively free from employers' interference —mainly because the statute did not provide for the machinery necessary to enforce those rights.

The old National Labor Board created under an executive order of the President had no statutory powers, and therefore, could act merely as a conciliatory agency. The National Labor Relations Board which succeeded the old board in July, 1934, was given only a semblance of authority under Joint Resolution 44 of the 74th Congress. This Resolution, rushed through both houses of Congress in the last minutes of the session, left the National Labor Relations Board without power to enforce the collective bargaining provisions of the law.

How important it is for the Board to possess authority sufficient for effective enforcement of its own decisions is shown in Chairman Biddle's testimony before the Senate Committee:

> The experience of the National Labor Board and the National Labor Relations Board in obtaining compliance and enforcing their decisions must be reviewed briefly in order to determine the value or necessity of those provisions of the Wagner Bill dealing with enforcement.
>
> Of approximately 5,309 cases brought before the Regional Labor boards between July 1, 1934, and March 1, 1935, about 3,950 have been disposed of. The cases brought before these Boards involved approximately 1,500,000 workers. Of these approximately 80 per cent involved violations of Section 7(a). To test, however, the question of whether the law is being en-

forced, we must look to the appeals brought from the Regional Boards to the National Board and see what has happened to them.

Ultimately the protection of the right to collective bargaining and the prevention of discrimination rests upon proper enforcement in the courts. The law has raised sharp conflicts and has been stubbornly and bitterly opposed. No one can doubt that unless the Government can secure certain and swift action in the courts in those cases where it is necessary to resort to judicial sanction, Section 7(a) will become a dead letter in the law.

Let us, therefore, turn to the record of the attempts by the two Boards to obtain enforcement. Between July 9, 1934, the date of its creation, and March 3, 1935, the National Labor Relations Board issued findings and decisions in 111 cases. In 86 of these the Board found that a violation had occurred. In only 34 of these did the employer make appropriate restitution in accordance with our decision. In the remaining 52 of the 86 cases such compliance was not obtained. In these 52 cases, therefore, it was necessary for the Board to attempt to obtain enforcement through the removal of the Blue Eagle or through court action. Of these 52 cases the Board referred 33 to the Department of Justice.

The status of these 33 cases is as follows: In one case a bill in equity has been filed in the District Court. Seven cases have been referred to the local United States Attorney, on the understanding that further evidence must be secured by him in cooperation with the Board before instituting suit. In none of these cases has suit been brought. In nine cases the Department of Justice has advised the Board that further investigation on certain points is necessary before the case can be referred to the local United States Attorney, and in three cases the Department has advised that as a matter of law no suit is justified. In thirteen cases the Department has not proceeded for various reasons. * * *

What I am getting at is not in any sense a criticism of the Department of Justice, but to show that the system under which we are working and the machinery under which we are trying to enforce the law makes inevitable the breakdown of legal enforcement, and the necessity for such machinery as the Wagner Bill includes.

The Chairman (Senator Walsh): It may not be a matter of criticism, but it is quite possible you would not be able to find in the Department of Justice any sympathy, or very little sympathy with your suggestion. I mean your broad understanding and knowing this problem, and having a keener interest in it, would naturally enable you to prosecute the cases better than a group of attorneys who only deal with these cases incidentally.

Mr. Biddle: That is excellently put, and continually knowing the problems of labor, it would seem more normal for us to be able to carry out the work of enforcement, than the Department dealing with them only incidentally.

During the National Labor Board's existence, in the first year of the Act, one case, the Weirton Case, was referred to the Department. Section 7(a) has been in effect for nearly two years. During that time, therefore, one case charging a violation of law has been tried and no violation found. One suit against an alleged violator has been filed in court, but so far no answer has been filed to the bill of complaint, which was ordered amended. In no other case has suit been brought or is there any immediate likelihood that suit will be brought.

The failure to obtain enforcement goes far beyond the mere failure to carry out the decisions of the Board. It affects and undermines the right to collective bargaining throughout the whole country and threatens to make the law a nullity. The reasons for this failure were not hard to find. First and most important is the fact that the National Labor Relations Board has a responsibility for the administration of Section 7(a) but is devoid of the power required to carry through the responsibility. The Board has no power to subpena witnesses and therefore cannot make up records which from a legal point of view are adequate. It has no power to enforce its own decisions but can merely refer them to the Department for prosecution, and in spite of the hearings held before the Regional Boards and of the appeal from the Regional to the National Board, the record compiled and the decision announced by the Board are merely recommendations and the case must be tried *de novo*.

I am not criticising the Department of Justice, which has properly enough taken the position that, since the National Labor Relations Board is empowered by the Executive Order which creates it to investigate issues of fact, the cases referred to the Department by the Board for prosecution should be fully and completely prepared in all legal details, but under its existing power the Board cannot accomplish what is expected by the Department and the result, as already indicated, has been a virtual suspension of enforcement.

A very common case is where a complaint of violation of Section 7(a) is made to one of the Regional Boards. A hearing is set and the employer is requested to attend. He refuses to appear. There is no way in which his attendance can be compelled. The Regional Board proceeds with the hearing in the employer's absence. It issues findings of fact and a decision. The employer refuses to comply with the decision and the record is

forwarded to the National Board. The NLRB prepares tentative findings of fact, based on the findings of the Regional Board, and sends a notice to the employer that a hearing will be held at which he will be given an opportunity to show cause why the tentative findings should not be made final. The employer again refuses to attend the hearing and NLRB makes its tentative findings of fact final. The case is then sent to the Department, but the Department, not wishing to prosecute on *ex parte* findings, sends the record back to obtain further facts. These cannot be supplied without the powers of subpena, and there is no enforcement.

It is necessary in all these cases to prove interstate commerce. This proof depends almost entirely on knowledge which can be furnished only by the company itself. An employee cannot prove whether or not his employer is engaged in interstate commerce, but this is necessary information before the Department can file a bill in equity. It becomes impossible to proceed further with the case.

To sum, after many months of hearings and delay, the case is sent to the Department, which almost invariably feels that certain additional facts must be secured before a formal case is filed with the courts. These facts cannot be obtained by the Board under its present powers.

Moreover, responsibility for the administration of the law is vested in the National Labor Relations Board, a specialized body created solely to deal with labor relations problems. The law permitting self-organization and collective bargaining raises numerous problems, economic, social and legal, which require expert knowledge and special training to handle. Section 7(a) is difficult of enforcement even under the most favorable circumstances. The language of the section is broad and subtle measures of evasion are countless. Adequate enforcement requires agents who are sympathetic with the basic purposes of Congress. The Board should be responsible not only for the administration of the preliminary hearings but for the enforcement of its own orders. The division of responsibility creates chaos. The local District Attorneys, upon whom falls the responsibility of instituting and conducting litigation, are not familiar with the problems involved, have had no experience in the field and cannot be expected to give its administration the same sympathetic support given by the Board.

The solution advanced for these difficulties is written into the proposed bill. Under this bill the Board will be given power to order the testimony of witnesses and the production of documents. With these powers the Board can make findings of fact in the same manner as other quasi-judicial tribunals. These findings, if

supported by evidence, will be accepted in the courts. The Board may itself issue cease and desist orders which it can take directly to the Circuit Courts of Appeals for enforcement. This provides a procedure that is full, swift and efficient. It gives to the Labor Board powers necessary to secure enforcement and at the same time provides adequate safeguards through review by the courts. It is not in any sense a novel procedure but on the contrary is one which has been adequately tested by the experience of other administrative tribunals, notably the Interstate Commerce Commission and the Federal Trade Commission.

Another aspect of the problem of enforcement second in importance only to the failure to bring cases before the courts is the delay involved in the present machinery.

In cases involving discrimination against workmen who have lost their jobs through union affiliation, time is of the essence. This is equally true where the employer has failed to bargain collectively. A union, particularly a newly established union, is not a static organization. If an employer can strike a swift blow the organization may disappear entirely; if he can deny it the rights guaranteed by the law for a substantial period of time it will decline and disappear. * * *

The union, let us say, asks for an election, and the matter is delayed six or seven months, and the union is gone. Forty men are locked out, the union files a complaint, and the success of the union may depend upon getting those men back to work. Four months pass, and nothing is done, and the union is gone. It happens continually, in our experience.

Restitution of damage done to an established organization through a violation of the law is ordinarily possible only if secured promptly after the damage occurs. In perhaps the majority of situations the case becomes for all practical purposes moot at the end of three to six months. Successful administration of this law is possible only if it is swift and efficient.

The present procedure for the administration of Section 7(a) wholly fails to meet this primary requirement of speed. The work of Regional Boards and of the National Board in every case where the employer is recalcitrant consumes months of time. When the case is finally passed through the machinery of the Boards, actual enforcement of the law can scarcely be said to have begun. The case must still be prepared in minute detail and commenced *de novo* in the courts, and when the case finally gets to court the long legal process of trial and appeal occupy many more months of time.

The two cases to which I have referred which have reached the courts give some indication of the period of time necessary in the present procedure to obtain a legal and enforceable deci-

sion. In the Weirton case the events which constituted the basis of the suit occurred in the summer and fall of 1933. A bill in equity was filed in the Federal District Court of Delaware in the spring of 1934. The Government attempted to speed up action by obtaining a temporary injunction on the basis of affidavits rather than trial. This method of procedure was overruled by the court. An amended bill of complaint was filed in September, 1934. Trial of the case occurred in the winter of 1934 and occupied over six weeks of time. Briefs were submitted and the case argued in January, 1935. Decision was made in the end of February, 1935, a year and a half after the events complained of had occurred and even then the case had of course traveled only through the trial court.

In the Houde Engineering Corporation case the company acts against which an injunction was sought began in the latter part of 1933 and have continued since that time. After numerous hearings by the old National Labor Board and the National Labor Relations Board a final decision was rendered by the latter Board in August, 1934. A bill in equity was filed in the Federal District Court on November 30, 1934. The company at the end of its allotted period of twenty days moved to require the Government to make the bill of complaint more definite and certain. This motion was argued on January 7, 1935. Decision was rendered on the motion on January 26, 1935, requiring the Government to amend the bill in one particular. Since that date there has been a dispute as to the meaning of the court's decision and the Government's amended bill has recently been filed. It is hardly necessary to labor the point that such delays as this amount to a complete nullification of the law.

I emphasize again that I am making no adverse criticism of the Department of Justice or of any other branch of the Government. The present powers of the Board make enforcement virtually impossible.

The solution in the proposed bill is that adequate powers be given to a single experienced agency to find out the facts and carry through enforcement of the law up to the point of review in the Circuit Court of Appeals.

V. Elections

Chairman Biddle's testimony before the Senate Committee contains a concise statement of the problem of elections and of the solution offered in the Wagner Bill:

A special feature of the enforcement problem which again sharply illustrates the collapse of existing machinery is the matter

of elections. An election is conducted by the Board for the sole purpose of ascertaining a single question of fact—what person or organization a majority of the employees in the plant wish to have as their representative for collective bargaining. The election imposes no obligation upon the employer except in cases where it is necessary to furnish his payroll lists. The Board is given the power to subpœna payrolls. Not until the election is complete and the question of the employer's duty to bargain collectively arises is the employer put under any substantial obligation by the Board's decision to hold an election.

Although Joint Resolution 44, to which I have referred, attempted to secure to the Board an effective power to order and conduct elections by permitting a subpœna of payrolls, the Resolution in this respect has been wholly nullified. Many elections (191 from October to March) have been held by the Regional Boards by consent; but in every case where the employer has not consented to the holding of the election and the National Board has been compelled to use its power to order an election the employer has succeeded in tying up the enforcement of the order almost indefinitely in the courts. In six cases the Board has ordered an election over the objection of the employer and in all six cases the employer has filed a petition with the Circuit Court of Appeals to review the Board's order in accordance with the provision of Resolution 44, providing that any election order issued by a Board may be reviewed in the same manner as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act. Of the six cases the Board's decision in two was issued in November, 1934, in one, in December, 1934, and in three in January, 1935. In none of these cases has the matter even come before the court for argument.

The proposed bill attempts to solve this problem by reducing the holding of an election to its proper status as a mere inquiry into the facts. The bill allows the Board to order the election without provision for review of the election order. The bill provides in Section 9(c):

"In any such investigation the Board shall provide for an appropriate hearing either in conjunction with a proceeding under Section 10 or otherwise and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives."

Moreover, the employer has no place in elections. Elections deal with the problem of the men as to who shall represent them and here the employer has no place. I am informed that in elections held by the National Mediation Board in the rail-

road industry, the employer is not a party in any way to the election proceeding. Obviously an employer should not be allowed to hold up an election. When the election ascertains the majority and the employer is then ordered to deal with such majority, the order is subject to review in the Circuit Court of Appeals.

It is interesting to trace the results of the consent elections for the period from July 10, 1934, to January 9, 1935. The National Board conducted at the 17 District Boards 100 elections during this period. In many cases one election covered several separate units. There were 528 units involved. Of these the trade unions won 301, or 57 per cent, employee representation plans and company unions won 162 units or 30.5 per cent and no representation was chosen in the other 65 units, representing 12.5 per cent.

It should be remembered that since these elections were all by consent, it is not probable the employer would not win, or he would not have consented to it, so if anything, it would be supposed that the figures would have shown strongly in favor of company unions, but the exact reverse has happened. * * *

In terms of votes, 20,682 votes—or 56.8 per cent of the total, 36,433 votes—were cast for trade unions; 12,139 or 33.3 per cent were cast for employee representation plans and 2,213, or 6.1 per cent were for some other representation. 45,397 employees were eligible to vote.

As a matter of interest we followed down the result of these elections. In other words, my evidence given yesterday was that collective bargaining was desirable, and the methods proposed by the Wagner Bill will make collective bargaining easier to obtain. Now, let us see what happened as the result of the election, because we have taken the trouble to follow up each of these cases I have referred to as to collective bargaining.

In 250 units the company bargained with elected representatives and in 201 tentatively so. In 207, written agreements had resulted, in 246 none had been written. In 242 units, however, harmonious results, even though not expressed in written agreements, were achieved. * * *

It may be said, therefore, that these elections show that where men are given a fair chance to express their desires in a secret ballot the trade union is far more usually selected than the company union and the technique of elections definitely results in the signing of collective bargaining agreements which, as I have said, is the underlying economic purpose of the law of collective bargaining.

VI. Majority Rule

The principle of majority rule in collective bargaining is established in the following provision of the Wagner Bill:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Sec. 9(a)).

Majority rule on the basis of a clearly defined bargaining unit must be accepted as the axiom of collective action in industrial relations.

The need for unqualified application of the majority rule in collective bargaining was clearly brought out in the testimony of Lloyd K. Garrison, Dean of the University of Wisconsin Law School and first Chairman of the National Labor Relations Board, before the Senate Committee. The following excerpt from the transcript of the hearings contains Mr. Garrison's discussion of this important issue:

> This bill adopts the principle that where the majority of the employees in the collective bargaining union have collective representatives for the purpose of collective bargaining, those representatives shall be the exclusive representatives of all the employees in the unit for the purpose of negotiating collective agreements. There is nothing new or startling about this principle.
>
> The National War Labor Board, appointed by President Wilson, with William Howard Taft and Frank P. Walsh as joint Chairmen speedily found out that in practice no other rule in collective bargaining could possibly work out, and so they adopted it and applied it consistently during the war years.
>
> In 1920 Congress passed the Railway Labor Act with a clause in it more or less like 7(a), with nothing said about majority rule. The Railway Labor Board appointed under that Act at once perceived that collective bargaining would be perfectly meaningless without the majority rule, and so they promulgated it and stuck to it consistently. And in the Railway Labor Act passed by Congress last year this principle adopted by the Board was written specifically in the laws of the country.
>
> Coming now to February, 1934, the President promulgated the majority rule in an Executive Order relating to the elections to be conducted by the old National Labor Board.
>
> Congress in June of last year adopted Public Resolution 44 providing for elections of employees to determine their representatives for the purpose of collective bargaining. It was quite clear from that Resolution that majority rule was intended, be-

cause otherwise an election would be quite meaningless; the only purpose of the election being to determine who the representatives are as decided by a majority of the employees. The Public Resolution was so interpreted by the President in two subsequent executive orders, one creating the Steel Board, and the other creating the Textile Board. Therefore, everybody that has had to deal with this problem, including the old National Labor Board in the Denver Tramway case, and the National Labor Relations Board in the Houde Engineering case, the National War Board, and the Railway Labor Board, and I might also add the Petroleum Labor Policy Board have all, without exception, applied the majority rule.

This is no mere coincidence. What other rule could possibly work? Here is a collective bargaining unit, let us say, for the sake of simplicity, a plant; all the men in the plant are doing more or less the same kind of work. If a collective agreement regarding wages and hours is to be worked out with the employer it must necessarily apply to everybody in that unit, everybody in the plant. So that it is not a question of negotiating an agreement with this little group or that little group, because no such agreement is practical. An employer cannot give one set of wages and hours to one group and another set to another where they are all doing the same type of work. It has to be an agreement applying to all. Then the only question is where there are two groups of employees, a majority and a minority group, with which shall the agreement be negotiated? It cannot be negotiated with both, because there is going to be only one agreement, and it is to apply to everybody. Is it at all sensible that the employer should negotiate that agreement applying to everybody with the group which represents the fewest employees? That is obviously silly. And it could only lead to trouble and to strife. As a practical matter he must negotiate it with the majority, with the group that represents the bulk of the employees. This seems so obvious that one wonders why any other rule should ever have been thought of.

It seemed to me last summer, as I sat on the Board and listened to these cases, quite evident that the opposition to this rule came down simply to this, that the employer who opposed the rule merely wanted to avoid doing any collective bargaining at all so long as he could keep his responsibility diffused. So long as he could say, "I will bargain first with this group, then I will bargain with that group, and then I will run back to the first and see what they think about the proposals," and so on ad infinitum, he would end up by reaching no collective agreement at all. And that is why the majority rule is opposed. It is opposed because

collective bargaining is opposed. But the purpose of this bill is to encourage collective bargaining, just as the purpose of Section 7(a) is to encourage it.

And what does collective bargaining mean? It means that process whereby collective agreements are ultimately reached. And how can you reach a collective agreement unless the employer's responsibility is fixed and determined? You must fix his responsibility to deal with one or the other of these groups exclusively, otherwise, you will get nowhere. And, as I have said, it is silly to put the responsibility on him to deal exclusively with the minority. He must be made to deal exclusively with the majority.

The opponents, who have severely criticised the Houde decision, have placed their main reliance on the interpretation of Section 7(a) by General Johnson, in which he came out against majority rule. I merely note for the record here that General Johnson in two of his recent articles has stated his view that the majority rule is the only practical method of working out collective bargaining.

I also wish to note that every company union plan in the country goes on a basis of majority rule, every company union plan provides in substance that the representatives selected by the majority of the employees shall run the company union and shall represent the employees in the dealings with the employer.

A great deal of tenderness is expressed by opponents of the majority rule for these minority groups. Crocodile tears are shed over the fact that these little minority groups are left out in the cold. It is thought to be some sort of an oppression, it is thought to be unjust that the majority groups should speak for all. What about the poor little minority group? The tears that are shed for the minority group would carry a little more conviction if it did not happen to be the case that nine times out of ten this little minority group is a company union, sponsored by the employer, and looked upon by him with favor as the more convenient of the two groups with which to do business.

Mr. Francis Biddle has also presented a vigorous statement urging the adoption of the majority rule in the Wagner Bill. His testimony follows:

The majority rule has been adopted in substantially similar form by every important board created for the continuing and regulating of labor relations, including the War Labor Board, the National Mediation Board, the National Labor Board, the Textile Board, the Steel Board, and the National Labor Relations Board. Section 7(a) provided, as does the Wagner Bill,

that employees should have the right to bargain collectively. Without majority rule bargaining would result in the playing off of groups against each other, resulting in no agreement.

Actual collective bargaining in industry has always been conducted on the theory that a bargain made with one group in a unit sets the standard for the entire unit, and a wide study of trade agreements has disclosed none which does not attempt to establish uniform conditions throughout the unit. Failure of the employer to give equally advantageous terms to non-members of the union negotiating the agreement would immediately result in a marked increase in the union's membership, and on the other hand the giving of better terms to non-members would result in a strike. It is, therefore, academic and a little silly to discuss the rights of minorities and individuals to negotiate for more favorable terms than those in the collective agreement.

The purpose of the Bill is to give workmen power to bargain effectively by collective action. It is obvious that they cannot do better by individual action. The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interferring with collective bargaining and not for the purpose of preserving the individual liberty of contract of the American workman. Nor does the making of a collective agreement applicable to the entire plant preclude the adjustment of individual grievances or particular employment relations in individual cases. In sum an employer who refuses to recognize the majority rule right does not intend to bargain collectively in any realistic sense.

As I have said, trade agreements were considered as establishing custom or usage for the entire plant, and were never construed as being for the benefit only of union members (161 Mississippi 4).

It seems unnecessary to refer to the political analogy of the majority in any election choosing representatives who shall represent all of the people; to refer the Committee to the acceptance of collective bargaining in England for many years, or at any great length to stress its presence in our own law. In the Railway Labor Act, as amended June 21, 1934, the language is very similar to the language of the Wagner Bill. Section 2 (4th) provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." And before that

the majority rule was established by administrative interpretation, under the Act.

In many cases arising before this Board, after a company union has been successfully formed by an employer, he has refused to deal with the trade union on the ground that the company union represented a majority of the employees. In the Guide Lampe Corporation case, 1 NLRB 48, the company wrote: "If we begin to practice a negotiation with each group which presents itself, we will not be complying with the provisions of the N. R. A. and a great deal of confusion would result . . . any negotiation or collective bargaining must be with the committee representing the great majority of our employees."

VII. Bargaining Unit

Mr. Biddle's statement before the Senate Committee emphasized the important fact that the Board must be given authority to determine the proper bargaining unit within which the majority of workers would speak for all:

The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner Bill provides that the Board shall decide the unit appropriate for the purposes of collective bargaining. This, as indicated by the Act, may be a craft, plant or employer unit.

The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statutes. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant.

The determination of the unit, therefore, must be made by an impartial agency which is aware of the industrial relationship existing in various types of industry, and of the history and experience of craft, trade and industrial unions. Moreover, any arbitrary act of the Board in selecting the unit is subject to check

on review by the court. It is impossible, however, to lay down a definite rule for the determination of the appropriate unit, for such an attempt would result in rigidity and confusion. The whole system of industrial control and development depends on flexibility and such considerations must be taken into account as the question of management and supervision, routine employment contracts, existing plans of collective bargaining and the distinctiveness of the occupation.

In his recent address before the American Bar Association, published in article form in the February issue of Survey Graphic, Dean Garrison has further illustrated the importance of carefully determining the appropriate bargaining unit:

> In the Houde case the Board stated that the determination of the proper bargaining unit or units, within each of which the majority should speak for all, must depend upon the circumstances. In subsequent opinions the Board has made it clear that the principal factors to be considered are: first, whether or not the functions and working conditions of a particular group are sufficiently distinct from those of other employees to justify considering the group as a separate unit entitled to negotiate a separate agreement; and second, the history of collective bargaining in the particular enterprise and the traditional groupings of the employees.
>
> Two cases will illustrate the application of these principles. A small group of welders in the plant of the United Dry Docks Company asked the Board to rule that they constituted a separate unit. There were forty-eight different crafts in the industry; most of them had for some time been represented by a Metal Trades Council; and basic labor conditions had been the subject of industry-wide provisions. In denying the application of the welders the Board referred to "the practical difficulties of requiring the management, engaged in building and repairing ships under general contracts, to deal separately on labor matters with perhaps forty-eight different interrelated crafts."

The Board added that:

> There is in the industry no history of prior contractual relations directly between welders and management . . . Separate bargaining by each occupational group for the wages of its own members would inevitably cause confusion and injustice to particular groups, a state of affairs from which all groups would ultimately suffer.

The second case involved the transportation system of the city of Detroit, consisting of street-car men and bus-men, the

former constituting the great majority of the employees. The bus-men and the trolley-men had for some years been represented by a single union which had had satisfactory relations with the city. Certain internal differences having arisen, the bus-men split off, formed an independent union and sought a separate bargaining status. There were no substantial differences between the hours, wages, working conditions and occupational duties of the bus-men and the trolley-men, and there was no showing that the majority were oppressing the minority. The Board suggested to the city and to the parties a method for composing the differences which had arisen between the two groups, and ruled that unless further facts were shown, the transportation system as a whole should continue to be the bargaining unit.

VIII. Discrimination and Coercion

President William Green in his basic statement before the Senate Committee has described the many ways in which the provisions of Section 7(a) have been flouted by employers throughout the country in order to prevent self-organization of the workers:

> We have by now, through thousands of cases all over the country, a clear picture of the course which has been pursued by employers to prevent self-organization on the part of their employees. Many of these cases have been before the Regional Labor Boards, the National Labor Board, and the National Labor Relations Board, so that complete records are available. Others have come to us in letters or have been told to representatives of organized labor. It becomes clear that there is a well defined pattern of action on the part of those employers who are determined to prevent the enforcement of Section 7(a). The artifices which have been employed by management to defeat self-organization and collective bargaining are legion.
>
> While discriminatory discharge is the single practice which is most frequently brought to our attention, countless other tactics are equally effective in breaking the spirit of the worker and convincing him that he must choose between the union and his job. When an employer has the intent to evade the law, he can find ample excuses for doing so. An infringement of factory rules and regulations which might ordinarily be overlooked can immediately become cause for discharge, where interest in the union has arisen. Work which for years has been wholly satisfactory may become defective when the worker becomes involved in the formation of a bona fide labor union. Without refusing to deal with the union he may meet again and again with union representatives with no honest intention of ever reaching an agreement.

Often there is concerted action agreed upon by employers throughout an entire locality or an entire industry. In this, employers are very often assisted by the local Chambers of Commerce or other employers' associations. In Clinton, Massachusetts, as an example, the Ralph A. Freundlich Company, which manufactures toys and playthings and which had already been convicted of violation both of Section 7(a) and of the terms of an agreement it had with the union of its employees, called upon the local Chamber of Commerce to help bring the necessary pressure to bear upon their employees to prevent them from organizing. A representative of the Chamber of Commerce addressed the employees, who were paid by the company to listen to him. He offered to take upon himself the settlement of any of their grievances and gave them to understand that it would be dangerous to them to form a union. The National Labor Relations Board, after hearing this case, came to the conclusion that the combined efforts of the employer and the Chamber of Commerce constituted intimidation and coercion.

As an example of how an employer may suddenly become conscious of the infringement of a rule of the company, let me cite the case of an employee of four years standing in Patrick, Inc., of Duluth, who, upon becoming a member of the Amalgamated Clothing Workers of America, was suddenly alleged to be holding back tickets from week to week. Yet, the National Labor Relations Board found it had been customary for the employees with the knowledge of the company to hold back tickets during busy weeks in order to assure the earnings of the minimum wage during slack weeks.

Another example of subterfuge employed was shown in the discharge of seven members of a local of the International Association of Machinists by the Available Truck Company of Chicago. One of those employees had worked for almost ten years for an official of the company and for the company itself. The reason given for his discharge before the Board was that he spent too much time on small jobs; another one of the seven, employed for four years, was alleged to have been discharged because a truck he had repaired thirty days before had broken down, although in fact he had not worked on the truck. No complaint had ever been made about the work of the men before they joined the union.

In seasonal industries discrimination has taken the form not only of discharge but of failure and refusal to rehire men after a layoff, if it is known that those men have shown interest in the union. This has been particularly effective in the automobile and automotive parts industry. I have talked personally with

a large number of men who have worked in automobile plants for many years, and whose work has always been satisfactory. They were called back year after year, at the end of the layoff season. But in the production season of 1934, they were not called back and many of them have not worked since.

Unless you have been in an automobile town like Flint or Pontiac, a one-industry town, where everything turns about the automobile plants, you cannot realize what this means to those men. They have not only lost their jobs, they have lost the homes they were buying, they have been forced to borrow, and finally to depend upon relief. Many of them will never again get work in any automobile factory, yet they have given many years to that work and are not able to move to other parts of the country in search of jobs, even if there were work to be had in other cities. The same condition exists generally throughout seasonal industries where employers are seeking to discourage organization.

In their attempt to interfere with and prevent the organization of their workers, employers have instituted espionage systems and have employed stool pigeons to such an extent that workers are afraid to talk to the men who work next to them. Many companies have spy systems so effective and so elaborate that they receive immediate reports on any employees who have the courage to assert their rights of self-organization.

There are two kinds of spy systems. In one an employer hires an agency to do his spying for him. The agency furnishes men who are put to work in various parts of the plant, where they are in contact with the workers. They profess interest in the union, and in many cases it is they who initiate talk of the union. They join any union which may be started and attend all meetings, and report at once to the employer the fullest details.

If the employer does not retain an outside agency to do his spying for him, he uses foremen and straw bosses, or other employees whom he calls "loyal" as stool pigeons, and they make it well worth the while of workers to drop the union, through giving them better jobs, higher wages, or assurance of more extended work. The Charles Pfizer & Company, Inc., in a hearing before the National Labor Relations Board, admitted that the company had an espionage system through the use of which it hoped to break up the union. "We knew there was some kind of an attempt to organize these men and we wanted to head it off if we could," the company's counsel said. So they used spies, and when they found the men who were interested in the organization of the union, they discharged them. In the automobile

industry, the Division of Research and Planning and the Bureau of Labor Statistics, appointed by President Roosevelt to make an investigation of conditions in the industry, found espionage systems very widespread and conducive of much bitterness on the part of the employees, who, as the Report said, know they are being spied upon night and day. That Report made clear how determined and widespread the violation of Section 7(a) has been in that industry. When genuine collective bargaining is established, the Report states, most of the shocking conditions now existing in the industry will be corrected.

I want to read a letter I received recently from a textile worker in Georgia, so that you may hear in a worker's own words what is going on.

"I just want to tell you about how they are doing the working people. If anybody here talks in favor of the union they will get some kind of excuse and fire them and won't tell anybody what they are fired about. They layed off about 45 here last week including me too; their excuse for laying me off, they said my work was not suitable and couldn't work me any longer and the bosses go over the mill and ask the help what they think of the union and if they are in favor of it they are payed up in a short while afterwards."

If there is no other way of breaking up the union the plant is shut down. Then when operations are resumed union members are not rehired. At the National Battery Company of Chicago, the following incident occurred.

Mr. Shields (the president of the company) called Killion (the president of the Union) over long distance telephone and in a conversation—a conversation heard by the plant manager and the president of the company union—Mr. Shields, after stating that he would never recognize the union and would never enter into any kind of an agreement with his employees, said: "If you will quit and get out of there, *I will give you a thousand dollars.*" Killion replied: "I am sorry, but I cannot do that. It would appear too much like selling out the men, and I absolutely refuse to do that." Mr. Shields then said: "Well, you will either do that or I will shut the plant down. It is one of the two, you get out of there, or I will shut it down." When Killion again stated that he would not get out, Mr. Shields said to the plant manager who was listening to the conversation over an extension: "Shut the plant down." The plant manager inquired: "Now or tonight?" Mr. Shields replied, "Shut it down immediately." The plant was closed immediately and remained closed until June 29th. (This conversation took place early in June).

Other companies may not merely close down for a time, but they may reorganize in order that former employees may have no claim whatever for reinstatement. The Ely & Walker Dry Goods Company of St. Louis, when it found that the employees of several of its departments were very thoroughly organized and wanted to bargain collectively, transferred the organized departments to a new corporation especially created for that purpose, called Handling, Inc., and advised its organized employees that they must secure employment through that new corporation, if at all. The men active in the union did not succeed in getting jobs.

Some companies move from one town or city to another, to break up the union. Others which have more than one plant move their equipment from an organized to an unorganized plant. Two fur dressing firms in New York moved from Brooklyn to Farmingdale, Long Island, refusing to take their organized employees with them. The New York Regional Labor Board and the National Labor Relations Board found their move was in order to avoid dealing with their organized workers. We today are trying to prevent a canning company in Indiana from moving its equipment from one of its plants to another, because its employees have dared to organize. That move will leave several hundred men and women without a means of livelihood. The cannery is located in a small town and is the only industry in the community.

Intimidation and coercion as practiced by employers also include such things as ejection from company houses, where the workers are employed in companies which own or control the towns in which they are located. Or if the workers and their families are not ejected from the company houses, they may suddenly be pressed to pay their company store bills; or no longer given credit at the company store. It takes courage these days, gentlemen, to join a union, even though the right to do so has legal sanction. Yet so desperate is the workers' need and so great his desire for help that he does join. He still looks to the government to give him the protection he was promised on June 16, 1933.

IX. Company Unions

Company unions were defined many years ago by Professor Hoxie, one of the most careful students of trade unionism, as "Unions instigated and practically dominated by the employers, organized and conducted for the purpose of combating or displacing independent unions." *

* R. F. Hoxie, *Trade Unionism in the United States,* p. 51 (2nd Ed. N. Y. 1923).

The company union which in effect is a method of coercion aimed to destroy the very fundamentals of free action on the part of the workers, is not native to this country. In its fully developed form the company union appeared in Germany in the late 90's, under the sponsorship of such anti-union employers as Stumm and was quickly branded "the yellow trade union."

Isolated attempts to establish company unions and similar employee representation schemes were also made in Great Britain, but never gained much headway there because of their undemocratic makeup which aroused widespread public opposition to the movement. During the post-war years powerful German employers especially in the steel industry have made another concerted drive upon the trade union organization by reviving company unions in the larger plants. By means of this device, German employers drove a sharp and powerful wedge into the ranks of the German trade union movement, already weakened by the years of war and the subsequent unemployment and destitution among the wage earners. When the present Fascist regime came into power, the unity of the German labor movement was broken and for the present undemocratic government of Germany complete destruction of German trade unionism proved to be an easy task.

In the United States, the company union first became significant at the end of the world war. It came as a more subtle substitute for the open shop movement designed to offset the progress made in collective bargaining under the rules and regulations for employer-employee relations established by the United States War Labor Board. Many large employers hastened to substitute company unions or similar employee representation plans for trade union bargaining agencies as soon as possible after the dissolution of the War Labor Board.

Large single corporations in industries of a monopolistic character have been more successful in building up company union organizations. The General Electric Company and other public utility firms, the Bethlehem Steel Company and similar concerns were organizing company unions in one large plant after another. Management of highly capitalized corporations soon realized that the dogged resistance by the workers to this imposition upon their freedom of action can be fought only if employers joined hands in furthering the anti-union campaign. Thus, the initiative for the company union movement was taken over by the Conference Committee made up entirely of management representatives which assumed responsibility for company union organization. Other resources were mobilized to further the cause such as the research facilities of the National Industrial Conference Board.

Under the leadership of the United States Steel Corporation, its subsidiaries and concerns financially affiliated with it, company unions

have had a tremendous growth since the adoption of the National Industrial Recovery Act. Since June 16, 1933, company unions flourished especially in the great industries such as steel, automobiles, rubber and chemicals. They were all the creature of the employer, the result of well thought out and considered effort on the part of national trade associations and employers' associations to confuse, mislead and defraud the workers of their legal rights. From its very nature, a company union has nothing to offer the worker. It is initiated by the employer, fostered by him, guided and controlled by him and paid for by him.

These facts are well brought out in President Green's testimony:

> The illegality of the company union has been long established in law. The Supreme Court of the United States in 1930, after a careful review of evidence in the case of Texas and New Orleans Railway vs. Brotherhood of Railway Clerks, found that by setting up the company union the employer had attempted "to corrupt and override the will" of the workers and the Court ruled this to be in definite violation of the Railway Labor Act and ruled the company union set up by the Railroad to be an illegal organization.
>
> The Supreme Court, in defining the terms "interference," "influence" and "coercion" as used in the Railway Labor Act, said emphatically that "the phrase covers the abuse of relation or opportunity" and gives unmistakable evidence that a company union constitutes an attempt to corrupt the free will of the employees.
>
> A few excerpts from trade journals on the subject of the company union, will show most clearly just what company unions are and what they are intended to do. In volume 61, page 62, of the magazine *Industrial Management,* is to be found the following:
>
> "The time for a company to make a move is when all is peaceful and no organizers are about. The employer must be ahead of the game if he expects to win. Let him put it off until the unions are on the ground and getting better entrenched every day, and he will have the fight of his life when he wakes up and tries to put across an organization that leaves the union in cold storage."

Surely nothing could show more clearly than this that employers themselves have since the adoption of the N. R. A. fully recognized the great desire on the part of their workers to organize freely. It shows that they have been determined from the very beginning to fight organization.

Automotive Industries of December 9, 1933, informed automobile and automotive parts employers that,

"Even though a union has started its propaganda and has made some headway, the plan (employee representation) seems to be good business. It prevents the union from assuming complete control . . ."

Again, the same magazine, in its issue of December 23, 1933, in a discussion of possible company union plans, warned against the adoption of any plan which permitted employee representatives to hold meetings at which company representatives were not present, because,

"It is thought to be bad policy to permit employee representatives to meet privately since there is no control over the issues that they bring up, and also, because the group forms a majority opinion on any issue which is hard to change in subsequent arbitration."

In order that the company unions might fulfill the interpretations which the employers themselves placed upon the collective bargaining portion of Section 7(a), *Automotive Industries* in its December 23, 1933, issue gave instructions to employers as follows:

"It is evident after listening to the experiences of those who have experimented in this field that while a successful employee representation plan primarily must meet the immediate practical needs of the situation, it must also be skillfully drafted so as to comply with the legal aspects of the plan as a contract between the employer and his employees . . . from a strictly practical point of view if the plan is drawn up so as to meet certain interpretations of Article 7(a) of the National Industrial Recovery Act, the employer at least has the semblance of right on his side and is placed in a better strategical position in his dealings with regional labor boards or the National Labor Board."

It would be difficult to find a more cynical and open attempt to destroy, deliberately, the rights of the workers in this major American industry, the industry which has benefited perhaps more from the Recovery Program than has any other.

The automobile industry is not the only one which has adopted this plan of evading the law. Probably the most aggressively supported company unions in the world are those in the steel industry. The United States Steel Corporation, shortly after the adoption of the National Industrial Recovery Act, appointed a Vice President whose duty it is to promote the company unions. The lumber manufacturers have their Four L's—The Loyal Legion of Lumbermen and Loggers; the Standard Oil of Ohio has its Sohio Plan; the rubber companies have their Employees Conference Plan and their Cooperative Plan; a textile mill in Alabama, employing 700 men and women, has

a Goodwill Adjustment Club; a fur company in Danbury, employing 200 workers, has a "Shop Union." Company unions may have different names; they may be in plants or factories employing thousands of men or employing 10 to 100 men, but in all essentials they are the same.

Of the company unions on which the American Federation of Labor has reports, only 18 per cent were formed prior to N. R. A. 61 per cent of the total were not started until an attempt was made by the employees to form a bona fide labor union. The plan originated directly with an officer of the company in 94 per cent of the cases, and in 51 per cent of the cases, organizers were paid by the company. By-laws were submitted by the company for 59 per cent of these company unions; employees automatically became members when hired in 44 per cent of these unions.

To quote at random from a few of these reports:

From the State of Washington comes this:

"Membership solicited by officials of the plant. Application cards bearing notation 'company union members to be given preference in work, promotion, etc.' Meetings held in plant, cards and literature given out by management."

From New York City we hear:

"This company union was formed by forcing the workmen to sign up by the foremen of the various departments, under threat of layoff if they did not sign."

A union in Michigan reports:

"The company union was put to a vote by the workers and voted down. And then we, the workers, were given application blanks to join the company union anyway."

From Pennsylvania we receive a report that:

"When the N. R. A. took effect, the employees were forced to vote for officers to form this company union. The men had to vote before they could receive their pay on a pay day, and that is the way it started."

From Augusta, Georgia, we hear this:

"The company union was organized as The Good Citizens Club by the mill management. A worker has to join the company union to get work in the mill."

While this report comes from North Carolina:

"Management persuaded two of our members to start it, and the workers not members of our union were first to be added.

Then our other members were approached, and a small percentage turned into members of the Loyalty Club, the company union."

Employers must keep hands off, completely, so far as labor organizations are concerned. Any other course of action cannot be reconciled with the belief which we all profess that employees are free citizens of the United States, and are not a menial or servant class, subservient to and controlled by the employing class.

Only employers of labor and their spokesmen have found merit in company unionism. Every impartial student of the American labor problem has condemned the company union as incapable of collective bargaining, undemocratic, and contrary to every principle upon which the American life has been built.

Following are excerpts from the testimony of Lloyd K. Garrison, Dean of Law School of the University of Wisconsin, and former Chairman of the National Labor Relations Board, at the hearings before the Senate Committee on Education and Labor:

A company union, however set up, can not possibly be effective as a collective bargaining agency for the very simple reason that the representatives of the company union are themselves employees, who are subject to being fired at any moment, who are looking for advancement, and therefore subconsciously any way hope to curry favor with their employer by being polite and courteous, and not bringing up disagreeable matters. They enjoy the prestige of their little position. They like to sit around the table with their employer and get free cigars and talk pleasantly about a lot of things, but when it comes to actually attempting to negotiate wages and hours for the plant they are absolutely helpless. * * * It seems to me essential, if collective bargaining is to mean anything, that the representatives who speak for the employees should be absolutely free. * * *

There is another fundamental vice in the company union, however it may be set up, which is this: that the company union representatives, being simply employees within the plant, have no means of knowing what the conditions of the industry are, what other plants are paying, what the wage level of the industry is, and they simply have not the information necessary to make them competent representatives of the men, whereas your trade union representative makes it his business to study the industry and to know what can be done and what should be done. * * *

And, finally, I would have this further observation about company unions: It seems to me the great thing to work for in this country is the making of industry-wide agreements such as

we have in the coal industry and in the garment industry, and several others.

Where you attempt to do collective bargaining simply on a plant to plant basis, here a little agreement and there a little agreement, you are bound to run into trouble and difficulty. The great thing to work out is the industry-wide agreement, whereby a union representing all of the workers in this particular industry will negotiate the same agreement with all of the employers in that industry with possible adjustments for regional differences. But it has the great advantage of putting all of the employers of the industry on a par so far as competition is concerned. It is not a question of getting what you can out of this employer, and a little less out of the next fellow. They are all on a par, and they start competing from that basis, which is highly desirable.

With the company union set-up it is impossible ever to conceive of reaching industry-wide agreements, because each plant there is treated as a thing in itself, and the talks go on within the plant without the least reference to the other units in the industry. Personally, it would seem to me altogether very desirable, if it could be done, to legislate the company unions altogether out of existence, regardless of whether they are dominated by the employer, or set up by the employer, or financed by him, because I think we shall make no progress under them whatever.

Charlton Ogburn who during the past eighteen months represented many National, International, and Federal Labor Unions affiliated with the American Federation of Labor before government boards on 7(a) cases, in his testimony before the Senate Committee painted a striking picture of the subversive methods and destructive effects of company unionism under the N. R. A.:

The right of labor to organize has been recognized by the courts of this country since 1842. When Congress enacted the N. I. R. A. with its Section 7(a) guaranteeing to workers generally for the first time by Federal statute the right to organize and bargain collectively, free from interference of employers, millions of workers throughout America, oppressed and underpaid for many years, lifted up their hearts on reading these marvelous words, and for the first time in their lives stood erect and breathed the air of freedom. As the famous words of the President on signing this Act were flashed over the land, the workers everywhere came together to form self-organizations with full confidence in this guarantee of their government.

Employers, too, considered that the government meant what it said in requiring 7(a) in all codes. The heads of the big in-

dustries conferred together to find means of evading this law without seeming actually to violate it. In a petition I have filed with the Steel Board I have called these conferences "conspiracy."

There resulted from them a device well calculated to nullify Section 7(a) and to prevent the self-organization of employees under it. That device is known as the "Employee Representation Plan." It was proffered by those big industries to their employees in plant after plant soon after the Recovery Act was signed. The plan was virtually the same in every plant. It was not collective bargaining—it was something to fool the workers into believing they would have collective bargaining.

I defy anyone to prove that an employee representation plan or a company union have ever effected by their own efforts a collective bargaining agreement. Hundreds of thousands of these workers—in fact, over two million—were not to be fooled by this plan or else were never offered it. These two million formed organizations of their own and joined American Federation of Labor unions. Many of them for the first time in their lives felt free men. Their response to the Roosevelt Administration was something akin to reverence.

By the fall of 1933, employers who before that had been fearful of incurring the wrath of their government or of having their conscience trouble them if they violated 7(a) began to get bold enough to discharge workers who had joined the union and refused to receive and deal with union committees. Employers grew bolder and these discharges continued. Meanwhile, employee representation plans were fostered and promoted by the big industries, elections were held under them and employees were forced to vote in those elections. The steel industry and the automobile industry flooded their employees with pamphlets containing false and libelous attacks on the American Federation of Labor.

During my brief career of eighteen months as attorney for labor unions (my first representation of a labor client came after the enactment of N. R. A. and my first labor case was the Denver Tramway case decided March 1, 1934) I have seen the sudden rise and the slow fall of their hopes. How many employees were discharged for union membership or activities will never be known. A conciliator for the Department of Labor has estimated as high as 250,000. Employers may tell you that these are unproved assertions and, perhaps, untrue ones. I tell you that I can prove any statement of fact I make to you. To my knowledge dozens of workers who have held the same jobs for many years, have, since the enactment of N. R. A., joined a union and suddenly found themselves walking the streets. How many

unions had been formed and could not function because the employer refused to deal with them, although he was obligated to do so, I have no figures to present. Numerous such cases were brought to the National Labor Board and later to its successor, the National Labor Relations Board.

X. Collective Bargaining and Economic Balance

Edwin S. Smith, member of the National Labor Relations Board and former Commissioner of Labor and Industry in Massachusetts, has urged before the Senate Committee that the fundamental purpose which the Wagner Bill is designed to accomplish is more equitable distribution of income:

> Let us consider the situation in which Congress found itself when the Recovery Act and 7(a) along with it were put into law:
>
> 1. Unemployment and low wages during the depression had reduced purchasing power to extremely low levels. It was felt that collective bargaining would offset this, raise the wages of industrial workers, and start the wheels of industry turning again.
> 2. The economic depths to which industrial workers had sunk during the depression were a shock to all Americans. We were ready for any reasonable measure of protection to labor that would prevent the continuance or recurrence of such evils.
> 3. It was necessary to balance the power given to business to organize under the codes by grant of a similar power to labor. Otherwise there was danger that price fixing, the elimination of unfair practices, or other methods of raising and maintaining prices under the codes would produce a situation where the return to capital would increase at a faster rate than payment of wages, thus continuing the lack of balance between these two classes of income, which was an important factor in producing the depression.

In this connection I call attention to the fact that Frederick C. Mills, the well-known statistical economist, shows in his book "Recent Economic Tendencies in the United States" that during the years 1922-29 the number of wage-earners declined on the average by 1.3 per cent a year while the output of the individual worker increased 3.3 per cent. In the same period wages increased at the average rate of 1.4 per cent a year but returns to stockholders advanced at the rate of 16.4 per cent. This concentration of income in the hands of the investing class, not compensated by equivalent gains to industrial wage-earners and farmers, helped to bring about a condition where the products

of industry could no longer be successfully marketed, at current prices, and thus accelerated the general collapse.

4. Since labor and the public generally were hostile to the suspension of the anti-trust laws, it was thought politically expedient to give labor the right to organize.
5. It was chiefly unskilled labor that would benefit by the minimum wage sections of the codes. It was necessary, therefore, to provide through collective bargaining for the maintenance of the differentials in the wages to be paid skilled workers.

Already there have appeared disturbing signs that the tendency for a relatively greater diversion of income to dividends and interest than to industrial wages has not ceased under the new economic legislation undertaken by the Government. This is said without prejudice to the degree of soundness, economically and socially, which this legislation possesses and with acknowledgment of the real accomplishment, economically and socially, in many fields which must be placed to its credit.

Under the circumstances of our present industrial situation and the history of our industrial system, there can be no doubt of the soundness of Sec. 7(a). The best thought and support which Congress can give to encouragement of labor organizations, and to enlisting employer support, is warranted as a measure of present economic recovery and future economic sanity. Organization of the workers is a bulwark against further dislocation of our economic system. It will help to put money into the hands of consumers, who in turn will spend it for the things which business needs to sell.

Without an increasing organization by labor to secure for itself a proper share of the income from industrial production the following situation is to be feared. The employer will be faced for years to come with large numbers of unemployed workers anxious for the jobs of those already at work. This will tend to depress wage levels. As long as N. R. A. continues to operate, competition will presumably have a lessened effect in bringing down prices. All the more necessary is it that the industrial wage-earner should be in a position to organize to protect his pay envelope against a higher price level. Finally, it is necessary, if we are ever to have a civilization worthy of the name, to raise the economic lot of the wage-earners not only relatively but absolutely. The figures for family incomes in the boom year of 1929 (as revealed in the recent study made by Brookings Institution) show that more than 42 per cent of our families had incomes less than $1500. Surely this is both shockingly and ridiculously low when compared to our vast resources of capital and technical skill, and the demands of our consumers, educated as

they are to economic desires which are beyond their financial capacities to attain.

There are real reasons, therefore, why the Federal Government, for the good and safety of the Nation, should continue to give protection to workers who wish to organize for collective bargaining. Even at best the process of labor organization will be a slow one. Let us not forget that labor is merely protected in its right to organize under 7(a) whereas employers were deliberately encouraged and even required to build up their economic strength by banding together collectively under the codes.

The statement of Dr. H. A. Millis, also a member of the National Labor Relations Board and one of the foremost American economists, analyzes the need for maintaining economic balance through collective bargaining in some greater detail:

As an economist and practical student of industrial relations I maintain:

1. That the great majority of wage-earners are employed under such conditions that they must act in concert with reference to wage scales, hours and working conditions if they are to have a reasonably effective voice as to the terms on which they shall work. Without organization there is in most modern industry unequal bargaining power, for the individual worker, as compared to the employer, is ignorant of the market situation and of employment opportunities; he has little or no reserve power in funds in hand; he fears to push a claim vigorously lest he be discriminated against or lose his job; he is likely to reason that it is better to accept or to retain employment on adverse terms than to lose working time while waiting for another job; he finds himself, unless peculiarly fortunate, pitted against other seekers of work and the cheaper man is likely to be the successful bidder; if he has employment, the terms of his contract, like the railway time-table, is "subject to change without notice."

2. That in pre-code days and only to a lesser extent since the codes were adopted, the average employer, however appreciative he may have been of the value of good employment conditions and the needs of his workers, has been under the necessity of reducing costs because of the money-saving, chiseling practices of his less socially minded competitors. If some firms have paid low wages or operated long hours, other firms have probably had to do so; if one firm has taken orders on just any terms, say to cut, make and deliver a suit of clothes in three days, or even in twenty-four hours, its competitors have had to do likewise or lose business. Informed labor leaders and observers recognize that most employers really wish to do what is fair but that com-

petition frequently prevents them from doing what they would like to do in labor matters. Nowadays we hear relatively less of equalizing bargaining power between an employer and his employees—my first point, and more of the need for standardization and control, of placing all firms in a market on pretty much the same plane of labor costs, and of having competitive success depend largely upon managerial ability, sound organization and the like.

Of course if there were perfect mobility of labor, keen competition for labor, and no concerted control of wages and hours by employers, the situation would be substantially different from what it has been and the case for collective bargaining would be less conclusive in modern industry.

I am aware that many of my academic brethren assume that these conditions just mentioned are generally true and reason that in the absence of such friction in the market, wages, hours, and all the rest of it rather readily adjust themselves to what industry, and consumers, should and can bear. The truth, as I see it, is, however, that the competitive demand for labor, while important, does not go far in protecting the workers against long hours, excessive overtime, fines, discharge without sufficient cause and objectionable working conditions. This is explained in part by the fact that employers are as a rule not actively interested in the long-run effects of hours and working conditions because of a lack of accurate knowledge of these effects, individual and social, and because the labor contract is ordinarily terminable at will. In so far as hours are concerned, there is fear that a reduction will mean reduced output and increased cost, or that one reduction will develop interest in another. That it is exceedingly difficult to return to a longer day or week when a short one has been in effect is well known.

The explanation is found in part also in the fact that workers accept employment chiefly in view of the rate of pay and possible earnings and accessibility of the place of employment. Long hours, much overtime, discrimination, inconsiderate discipline, and bad working conditions may give rise to a large turnover of labor due to many quittings; but such a turnover has not generally led management to ascertain causes and to remedy them. Do we not find twenty firms with neat turnover figures which do nothing with them for one that seriously uses them in an attempt to improve management?

Finally, the explanation is found in part in the fact that there is usually keen competition in the market for the product as well as competition for help. In order to extend business, to hold business, to meet the needs and whims of customers with

reference to style and delivery, to make favorable prices and to maintain profits and dividends, these things are likely to be taken out of labor. And, if there is monopoly, the situation may be even worse.

One is thus driven to the conclusion that hours of work and conditions of work—things which intimately concern workmen, are best decided collectively—through legislation or through collective bargaining, and some of them are not easily subject to legislative control. This is particularly true of a reasonable degree of security of tenure.

The case for collective bargaining is only less strong with respect to wages.

In a boom period, when prices are rising and profits are good, it is true that business is very active and bidding for labor generally becomes keen. It may even develop to the point of stealing help. At such times rates of pay advance rapidly. But in more normal times, though progress is being made and most workers are finding employment, wage advances are hesitantly offered, and there is more or less room for underpayment, even for a considerable degree of exploitation. For there are groups with very limited mobility, and new accessions to the labor supply and displaced workers are more or less eagerly seeking employment on such terms as their limited individual bargaining ability will secure for them. It may then well be that there are no well-defined standards of wages in certain industries and in many localities. For long periods labor tends to be absorbed into the industry or locality with limited relation to wages paid elsewhere. Within the given industry or locality there are the lower obstructive wages paid by hard-boiled managers. Piece-rates are nibbled here and there, more work or better quality is exacted, and the worker is stretched out. All the while in most plants there is a bad rate structure, slowly corrected, when corrected at all. The fact is that wages depend to a considerable extent upon the policies of the employers, as so many investigations have disclosed. To secure evidence, study, among others, the needle trades, the bituminous coal industry, the cleaning and dyeing industry, the laundry trade, the manufacture of candy, and the cotton textile industry.

Moreover, one must not assume that there is no element of monopoly or concerted control in the demand for labor or in fixing wages. For that is by no means true. An employer, or a group of employers acting in concert or just individually fearing to create problems, may dominate the employment situation in a community. So it was in the mining of anthracite coal between the middle of the seventies and the turn of the century when

collective bargaining was renewed. Wages were pegged, payment for timbering and "dead work" was reduced or eliminated altogether; coerced purchases at company stores charging high prices, and powder sold at a profit of 200 per cent, took the larger part of the earnings of the miners. Even in a city like Chicago, an industry may dominate a large community and the firms engaged in it may control the situation within rather wide limits. Going beyond this, I could cite a number of instances where associations of manufacturers or merchants or publishers have fixed scales, or, indeed, maximum wages to be paid and have enforced them more successfully than any American state has enforced its minimum wage standards. How many such instances there have been or are no one can know, but there is good reason to believe they have not been so exceptional as the uninitiated think. They have real significance in the real world of employment.

3. That a measure of control of wages is necessary if the needed relationship between consuming power and production is to be maintained and general instability checked.

I have spoken of the need for organization of labor and collective bargaining if workers and the typical employer are to have substantially equal bargaining power and if conditions are to be standardized and a plane of fair competition is to be established in industry. More recently a new doctrine has been invoked not only in support of collective bargaining in defending labor's wage interest but also in furthering and obtaining a higher standard of living for the wage-earners. I refer of course to the doctrine of high wages and mass purchasing power which has played an important role in this country in recent years and which underlies so much of the "New Deal."

The doctrine is that wages must be made high and kept high to provide the mass purchasing power required to maintain a market outlet for goods produced. As often stated the doctrine is open to criticism because it makes too much of the idea of a limited market. Very frequently there is failure to realize that the whole value of what is produced is distributed to labor, management and the owners of property employed—that each dollar, whether obtained as wages, interest or profit, has potential buying power. Moreover, it frequently is not fully realized in practical dealings that there must be prospect of adequate profit and adequate return on investments if the wheels of industry are to turn and afford employment. The doctrine does, however, contain a large kernel of significant fact. The rate of saving and investment, the amount of speculation and room for error in forecasting the market, vary with the distribution of

the industrial product. Other things equal, the smaller the share going as wages, the more rapid is saving and investment in productive capacity or the alternative, speculation in stocks and the like, and the greater the risk of industrial miscarriage. As Dr. Moulton has so splendidly shown in his recent book on the *Formation of Capital,* investment in increased and improved facilities for production—i.e., capital in the social sense, is limited by the possibilities of consumption. The fact is that there is a close relation between consumption and such investment. While not keeping even step, the two go hand in hand. Additions to and replacements of productive capital must be supported by capacity to buy and consume. When saving is greater than required for the capital equipment needed to satisfy consumption, the excess savings find a foreign outlet or find a place in the speculative market. Such was the case during the post-war years down to 1929 when speculation ran rife. An uneconomic distribution of the national income was one of the causes of the depression which then ensued.

Everyone must be interested in recovery. Everyone should be interested also in a lasting or durable recovery. Profit must be in prospect if there is to be recovery, but if recovery is to last, there must be a better distribution of the national income than we had during the twenties. Everyone should be interested in reform to that extent if he has the longer run, stability, and the social good at heart.

4. That if and when collective bargaining is freed from undue militancy, as it can be when wise management and good labor leadership are brought into cooperation, special problems connected with collective bargaining clear up and there are opportunities for gain to all parties. Reference may be made to union-management cooperation in railway shops. Such cooperation did not begin in fact nor has it been limited to those concrete instances. There has been much of it in organized industry and it can be greatly and profitably extended with the exercise of patience and brains. Many employers have found that they can conduct their business more satisfactorily on a union than on a non-union basis.

Such is the positive case for organization of labor and collective bargaining. But is not an alternative to be found in standardization and control through law? More specifically, do or cannot the codes adequately safeguard the legitimate interests of labor and give a sound distribution of the industrial product? It is frequently said that this is or might be true.

Much is to be said for the codes and many of them should be continued indefinitely in revised form. They have given the

widest application of the principle of the mandatory minimum wage which has redounded to the immediate benefit of common labor particularly, and they have brought the work-day and the work-week under effective control for the purposes in mind. But the codes have all too frequently been accompanied by short-sighted price-fixing and price-maintenance which curtail consumption and the volume of production and employment. More important, they evidence the effectiveness of pressure groups. What a code contains depends very much upon whether labor is effectively organized and articulate. Code administration depends almost as much upon the same thing. Pressure group must be balanced by pressure group under democratic government.

I, therefore, maintain that organization and intelligent and honest collective bargaining has a sound basis in economics.

In his recent address before the Economic Forum at Columbus, Ohio, Chairman Francis Biddle of the National Labor Relations Board made it clear that equality of bargaining power between labor and management must be assured to sustain the progress of economic recovery.

The practice of collective bargaining is not, contrary to popular belief, a product of the New Deal. It is the logical economic development of the recognition of labor unions as not only legal but social entities having their normal place in American society. Legal concepts do not outlive the imperative of facts; but they tend to absorb their compelling significance. We no longer conceive of labor organizations as conspiracies; for the evil of conspiracy is the end sought, and the end sought —to improve conditions of life—does not now, in our minds, interfere with the inherited scriptural tradition to keep the poor always with us. But this recognition was slow and grudging in the minds not only of the courts but of the cautious pioneer society whose outlook they so faithfully reflected.

Gradually we came to realize that the inequality between employer and workman—there were few employers and plenty of workmen—made it necessary that workers should be permitted to combine if a fair bargain was to be struck; should, as this realization has developed in recent years, be encouraged to combine. The right to work, the freedom to contract, the tradition of the rugged individual with a door open to his future if he could but apply himself, and take what was offered—these phrases lost their reality in a world where the labor market was choked with a fluid and floating surplus, where industry dictated the contract, and the worker took it, or starved; where the individual, to make his ruggedness effective, must combine and act thus in combination.

This brief summary is no reflection on industry. There, too, to meet the rising costs of an advancing standard of living or the low prices of a competitor, combination became essential, and the towering corporate and physical structures of modern large scale production were created out of the necessity of growth and expansion in an economic system in which to be static meant destruction.

We hear so much fatuous generalization about the motives of capital and labor, which assume that profit motivates the employer alone, as if the men who worked for him did not also want to get what they could out of the ultimate distribution. The same object brings the inevitable conflict of interest, the competition of each to get what he can. I, for one, cannot think in terms of moralistic class generalities. Because a man is an employer does not, I believe, pre-dispose him to being hard-boiled, any more than the fact that a man works with his hands puts his heart necessarily in the right place. Work in itself is not sacred; but work well done, fashioned to an end, integrated to a decent way of life, seems to fill life pretty well. I cannot find blamelessness on either side.

But inequality is not a moral, but an economic attribute. And a man's actions are, of course, motivated by his desires. So a lock-out to an employer may be as much his expression of moral indignation as a strike to a workman.

Does it not, therefore, become a problem of economic balance, the setting up of the cohesive power of labor against the vast power of industry? It is a power which may be exercised in two ways—industrial war, the strike, and industrial peace, collective bargaining.